

The Hazardous Waste Regulatory Programs and the Federal Common Law of Nuisance: A Confusion Between Preemption and Codification*

I. INTRODUCTION

The roots of the federal common law of nuisance can be found in two early twentieth-century Supreme Court decisions. In these cases, the Supreme Court first acknowledged the jurisdiction of the federal courts to entertain cases brought by states to abate pollution arising in a neighboring state. In *Missouri v. Illinois*¹ and *Georgia v. Tennessee Copper Co.*² the Court enunciated that a sovereign possesses a right to protect its ecological resources from unreasonable interference by another state or its citizens.³ The “quasi-sovereign”⁴ right to be free from external environmental impairment required the judiciary to fashion a federal common law⁵ to resolve interstate disputes⁶ and to implement national statutory policy, particularly when natural resources were at issue.⁷

The nature of this right was described in *Georgia v. Tennessee Copper Co.* as follows:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains . . . should not be further destroyed or threatened by the act of persons beyond its control. . . .⁸

A similar “fair and reasonable demand” prompted the Supreme Court, in *Illinois v. City of Milwaukee (Milwaukee I)*,⁹ to author a federal common law governing interstate water pollution. In the same year that *Milwaukee I* was decided, however, the Legislature also responded to the problem of water pollution. Congress

* As this note went to press the House and Senate adopted the Conference Report on H.R. 2867, “The Hazardous and Solid Waste Amendments of 1984” and on November 9, 1984, President Reagan signed the amendments into law [15 Current Developments] ENV’T REP. (BNA) 1243 (Nov. 16, 1984); see *infra* note 161. The conference action and adoption of the amendments does not materially affect this Note’s analysis and the Conference Joint Explanatory Statement lends support to the conclusion in part IV.

1. 200 U.S. 496 (1906).

2. 206 U.S. 230 (1907).

3. *Id.* at 238; *Missouri v. Illinois*, 200 U.S. 496, 520 (1906); see also *New Jersey v. City of N.Y.*, 283 U.S. 473 (1931); *New York v. New Jersey*, 256 U.S. 296 (1921).

4. In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), Justice Holmes described the interest each state possesses, in its capacity as a “quasi-sovereign,” in protecting the quality of its environment:

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.

5. See Ludington, THE SUPREME COURT AND THE POST-ERIE FEDERAL COMMON LAW, 31 L.ED.2d 1006 annot.

6. Drafters of the Constitution anticipated interstate legal controversies and the subsequent federal interests involved. THE FEDERALIST No. 80, at 476–79 (A. Hamilton) (C. Rossiter ed. 1961). See generally Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1026–42 (1967).

7. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); see, e.g., *Kansas v. Colorado*, 206 U.S. 46, 95, 97–98 (1907).

8. 206 U.S. 230, 238 (1907).

9. 406 U.S. 91 (1972).

enacted the Federal Water Pollution Control Act Amendments of 1972 (1972 Amendments),¹⁰ a measure designed to monitor and control discharges of pollutants into navigable waterways.

In *City of Milwaukee v. Illinois (Milwaukee II)*¹¹ the Supreme Court ruled that the legislature's enactment of the 1972 Amendments preempted federal common law,¹² and that federal courts were barred from imposing stricter effluent discharge standards than those established by Congress.¹³ The Court appeared convinced that the imposition of comprehensive regulations evidenced a congressional intent to eliminate the application of federal common law. This preemption holding was boldly reiterated in *Middlesex County Sewerage Authority v. National Sea Clammers Association (Sea Clammers)*,¹⁴ when the Court announced that no federal common law of nuisance remained in the area of water pollution.¹⁵ Together, *Milwaukee II* and *Sea Clammers* have eliminated judge-made standards designed to control the pollution of interstate and navigable waterways.

Past and current industrial toxic waste disposal practices present a resource pollution problem similar to those addressed in the *Milwaukee I* and *Milwaukee II* decisions. The dangers posed by toxic substances have captured the nation's attention, and the past decade has witnessed an explosion of federal environmental laws and regulations.¹⁶ Three of the most significant legislative programs designed to regulate the handling and disposal of hazardous wastes are the Safe Drinking Water Act of 1974 (SDWA),¹⁷ the Resource Conservation and Recovery Act of 1976 (RCRA),¹⁸ and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).¹⁹

Unfortunately, current regulatory efforts will not quickly subdue today's pervasive threat of harmful toxic substance exposure. According to the Environmental Protection Agency's (EPA's) most recent estimate, 71 billion gallons, or 290 million metric tons, of toxic wastes are generated each year.²⁰ In 1981, 14.7 billion gallons of the waste were disposed of in and on land and approximately sixty percent of the waste was injected into underground wells. Most of the remaining hazardous substances were received by waste disposal sites either known to be leaking or expected to leak in the future.²¹ The best estimate of the number of uncontrolled hazardous waste sites in the United States is about 15,000, and the best estimate of sites that will not have any responsible or financially viable parties and are entirely

10. 33 U.S.C. §§ 1251-1376 (1982) (amending Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-1175 (1970)) [hereinafter cited as the 1972 Amendments].

11. 451 U.S. 304 (1981).

12. *Id.* at 314-15, 332.

13. *Id.* at 320.

14. 453 U.S. 1 (1981).

15. *Id.* at 21-22.

16. See *infra* text accompanying notes 83-118.

17. 42 U.S.C. §§ 300f to 300j-10 (1982).

18. 42 U.S.C. §§ 6901-6987 (1982).

19. 42 U.S.C. §§ 9601-9657 (1982).

20. Shabecoff, *U.S. Study Assesses Toxic Waste Woes*, N.Y. Times, April 28, 1984, at 9, col. 6.

21. *Id.*; see also Shabecoff, *Hazardous Waste Exceeds Estimates*, N.Y. Times, Aug. 31, 1983, at 1, col. 1.

dependent on government money for cleanup is about 100 hazardous waste sites.²² Additionally, as of yet no reliable data are available to help assess the environmental threat presented by illegal toxic waste dumping.²³

The statutory law of toxic substances does not adequately protect the human and natural resources threatened by hazardous waste released from these dumpsites.²⁴ Hazardous waste pollution controversies provoke the strong federal interest and the compelling need for effective national policies that traditionally support the employment of federal common law, especially in interstate groundwater disputes. However, lower courts construing federal common-law nuisance claims in the hazardous waste context have not reached this conclusion. To date, the two federal courts directly confronted with the preemption question with regard to RCRA and CERCLA have found the federal common law preempted.²⁵ In *United States v. Price*²⁶ the government brought an action seeking injunctive relief to remedy the hazards posed by chemical dumping that occurred at Price's Landfill in Pleasantville, New Jersey.²⁷ Water samples revealed significant contamination of the water drawn from wells under the landfill as well as the water drawn from wells in the surrounding area. The court found that the presence of any one of the many contaminants identified in the groundwater surrounding Price's Landfill would present an extremely serious public health problem.²⁸ In *City of Philadelphia v. Stepan Chemical Co.*²⁹ the City sought to recover cleanup costs and the consequential damages that resulted from the defendant's illegal dumping of industrial waste on city property.³⁰ The City alleged that as a result of the illegal dumping, the soil at the site had been contaminated and the adjacent Delaware River and groundwater underlying the site had been polluted.³¹

The plaintiffs in *Price* and *Stepan* each alleged several common law theories of recovery, including the federal common law of nuisance, and both courts read *Milwaukee II* as requiring the preemption of federal common law in hazardous waste activities.³² The district courts indicated that the "comprehensive nature of the

22. TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL, OFFICE OF TECHNOLOGY ASSESSMENT: SUMMARY 1, 30 (1983); [14 Current Developments] ENV'T REP. (BNA) 1155 (Oct. 28, 1983).

23. [14 Current Developments] ENV'T REP. (BNA) 1155, 1162 (Oct. 28, 1983).

24. See *infra* notes 268-301 and accompanying text.

25. *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982); *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

26. 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982) (The district court ruling on the federal common law issue was left intact by the Third Circuit.).

27. *Id.* at 1057.

28. *Id.* at 1063. The District Court of New Jersey denied the government's motion for injunctive relief to remedy the dumpsite and also denied defendant's motion for summary judgment; plaintiff's claims brought under the federal common law of nuisance were summarily dismissed. In the most recent ruling in the case, *United States v. Price*, 577 F. Supp. 1103 (D.N.J. 1983) (denial of summary judgment motion to second amended complaint), the court declared that "there is no dispute that Price's Landfill requires immediate action," *id.* at 1113, and that "the danger which exists at Price's Landfill . . . only gets worse with the passage of time." *Id.* at 1117.

29. 544 F. Supp. 1135 (E.D. Pa. 1982).

30. *Id.* at 1139.

31. *Id.*

32. *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1148 (E.D. Pa. 1982); *United States v. Price*, 523 F. Supp. 1055, 1069 (D.N.J. 1981).

schemes established by the RCRA and the CERCLA³³ supported the inference that Congress had fully occupied the hazardous waste disposal area so as to deny the availability of federal common law nuisance remedies.

However, a federal common law of nuisance in toxic waste actions has not been uniformly quashed. Courts have struggled with the jurisdictional and substantive natures of section 7003³⁴ of RCRA and sections 106(a)³⁵ and 107³⁶ of CERCLA in actions invoking these provisions. Specifically, decisions assessing the scope of liability under these imminent hazard and liability provisions recognize a codified federal common law of nuisance as the substantive basis of decision.

This Note analyzes the direct and indirect applications of the *Milwaukee II-Sea Clammers* preemption rulings in the context of hazardous waste pollution. Part II examines the development of the federal common law of nuisance and its curtailment and reviews: (1) *Milwaukee I*, *Milwaukee II*, and *Sea Clammers*; (2) the general regulatory structure of RCRA, CERCLA, and SDWA; and (3) the analysis used in *Price*, *Stepan*, and related decisions evaluating the federal common law of nuisance in the hazardous waste area. Part III conducts a review of the preemption of federal common law and seeks to distinguish the legislative responses to hazardous waste pollution activities from the water pollution program deferred to in *Milwaukee II*. This section's analysis highlights the factors that the majority in *Milwaukee II* emphasized as significant in inferring a congressional intent to preempt the federal common law of nuisance. Part III then examines subsequent mechanical applications of these *Milwaukee II* "preemption standards" to hazardous waste regulatory activities. Finally, part IV concludes that Congress intended to preserve and supplement all remedies previously available to the public and to the government in order to advance the overriding federal interest in a safe and healthy environment. Specifically, Congress formally codified federal common-law principles in the imminent hazard and liability provisions of the hazardous waste laws.

II. THE RISE AND FALL OF THE FEDERAL COMMON LAW OF NUISANCE

While *Erie R.R. v. Tompkins*³⁷ abolished general federal common law, the Supreme Court expressly applied federal common law in a case decided on the same day as *Erie*.³⁸ The basis for applying federal common law rather than resorting to state law stems from a judicially ascertained federal policy. Before rules of federal common law are to be applied, a significant conflict between federal policy and the

33. *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1148 (E.D. Pa. 1982) (quoting *United States v. Price*, 523 F. Supp. 1055, 1069 (D.N.J. 1981)).

34. 42 U.S.C. § 6973 (1982).

35. 42 U.S.C. § 9606(a) (1982).

36. 42 U.S.C. § 9607 (1982).

37. 304 U.S. 64 (1938).

38. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). Federal decisional laws have been held to constitute "laws" within the meaning of the statute conferring federal question jurisdiction on the federal district courts, *Illinois v. Milwaukee*, 406 U.S. 91, 91 (1972), and within the meaning of the removal statute. *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968). Federal common law also reigns supreme over state law. *Francis v. Southern Pac. Co.*, 333 U.S. 445, 450 (1948).

use of a state's law must be specifically shown.³⁹ Typically, federal common law is applied to establish rules of law in areas which by their nature should be uniform throughout the nation.⁴⁰ This need for uniformity is the most frequently cited reason for the fashioning of a federal common law.⁴¹ In developing a federal common law of nuisance, the courts have been guided by common-law principles of public nuisance.⁴² Under these principles, a nuisance is a substantial, unreasonable interference with the use and enjoyment of land⁴³ or with a right common to the general public,⁴⁴ for which a public official may obtain relief.⁴⁵

A unified theory of the federal common law of nuisance was first recognized in 1971 by the Tenth Circuit in *Texas v. Pankey*.⁴⁶ In *Pankey*, the court declared that since no applicable statutory remedy existed, an appropriate cause of action should be made available under common law.⁴⁷ One year later, in *Illinois v. City of Milwaukee (Milwaukee I)*,⁴⁸ the Supreme Court achieved the same result on essentially similar grounds.

A. Milwaukee I, Milwaukee II, and Progeny—Preemption by Implication

1. Milwaukee I

The United States Supreme Court declined to exercise original jurisdiction⁴⁹ over Illinois' claim that the City of Milwaukee, Wisconsin was discharging untreated and inadequately treated sewage into Lake Michigan.⁵⁰ Instead, the Court held that the attempt by a state to regulate municipalities of another state should first be heard in federal district court and remanded the case for resolution as a federal common law nuisance action.⁵¹ Upon examination of the existing federal water pollution statutes,⁵² the Court also decided that Illinois' claim fell within a gap in the federal statutory scheme.⁵³

39. *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966).

40. *United States v. Yazell*, 382 U.S. 341, 353-54 (1966).

41. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 381 (1969).

42. RESTATEMENT (SECOND) OF TORTS § 203 (1964).

43. W. PROSSER, THE HANDBOOK OF THE LAW OF TORTS § 87 (4th ed. 1971).

44. *Id.* § 88, at 585.

45. Private individuals may obtain damages or injunctive relief if an injury different in kind from that suffered by the general public can be demonstrated. *Id.* at 586; see also Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

46. 441 F.2d 236 (10th Cir. 1971) (Texas requested relief from agricultural pesticide runoff from New Mexico farms.).

47. *Id.* at 241. Thus, while Texas could have brought the case in the Supreme Court by virtue of its status as a sovereign, the district court had full authority to hear the case, not by virtue of the status of the parties but because of the nature of the legal claims at bar.

48. 406 U.S. 91 (1972).

49. *Id.* at 108.

50. *Id.* at 94.

51. *Id.* at 108.

52. *Id.* at 101-02. The Court identified six statutes through which Congress had asserted a federal interest in interstate water quality.

53. *Id.* at 103. The environmental degradation of navigable interstate waters was an issue upon which federal statutes or decisions were not conclusive.

Thus, federal common law, as pronounced in *Milwaukee I*, ostensibly provided states an effective avenue of redress for interstate water pollution disputes. The *Milwaukee I* Court's final justification for applying federal common law was founded upon congressional demonstration of a strong national interest in preserving the nation's waterways.⁵⁴ The conclusion of the Court that a strong federal interest in the purity of interstate waters existed was well supported by prior congressional activity in the area of environmental legislation.⁵⁵

2. Milwaukee II

Several months after the *Milwaukee I* decision, Congress decided to require permits for all discharges into the nation's waters and passed the Federal Water Pollution Control Act (FWPCA) Amendments of 1972 (1972 Amendments).⁵⁶ The City of Milwaukee obtained the requisite permits, but suffered an adverse judgment in a state court enforcement action for failing to comply with the permits' terms. Meanwhile, Illinois had won a judgment against the City of Milwaukee in the northern district of Illinois for an abatement of the pollution. The district court found a nuisance under federal common law in the discharge of inadequately treated sewage from petitioner's plants and in the discharge of sewer overflows.⁵⁷ On appeal, the Seventh Circuit affirmed in part and reversed in part, ruling that the 1972 Amendments had not preempted the federal common law of nuisance.⁵⁸ The court reversed the effluent limitations on treated sewage imposed by the district court because they were more stringent than those in the permits and applicable EPA regulations. The Seventh Circuit upheld the lower court's order to eliminate all overflows and the construction timetable designed to achieve this goal.⁵⁹

In *Milwaukee II*⁶⁰ the Supreme Court reversed the Seventh Circuit and held that the 1972 Amendments to the FWPCA had eliminated the need for a federal common law of nuisance for interstate water pollution.⁶¹ In the opinion for the Court, Justice Rehnquist stated:

54. *Id.* at 101-03. Writing for the *Milwaukee I* Court, Justice Douglas stated that "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law." *Id.* at 105 n.6.

55. For a complete directory of water pollution legislation prior to 1972, see HOUSE COMM. ON PUB. WORKS, 91ST CONG., 2D SESS., LAWS OF THE UNITED STATES RELATING TO WATER POLLUTION CONTROL AND ENVIRONMENTAL QUALITY (Comm. Print 1970).

56. 33 U.S.C. §§ 1251-1376 (1982).

57. *Illinois ex. rel. Scott v. City of Milwaukee*, 366 F. Supp. 298, 299 (N.D. Ill. 1973); see *City of Milwaukee v. Illinois*, 451 U.S. 304, 311 (1981). The judgment required Milwaukee to meet a set timetable for fulfillment of the permit's requirements. *Id.*

58. *Illinois v. City of Milwaukee*, 599 F.2d 151, 155 (7th Cir. 1979).

59. *Id.* at 164. The court of appeals ruled that the 1972 Amendments had not preempted the federal common law of nuisance, but that "[i]n applying the federal common law of nuisance in a water pollution case, a court should not ignore the Act but should look to its policies and principles for guidance." *Id.*

60. 451 U.S. 304 (1981).

61. *Id.* at 314-26. Justice Rehnquist, writing on behalf of six members of the Court, referred to a passage in the *Milwaukee I* opinion which noted that it may happen that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Id.* at 314 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972)).

We conclude that, at least so far as concerns the claims of respondents, Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.⁶²

The *Milwaukee II* analysis discussed the implied congressional intent to preempt federal common law,⁶³ because neither the 1972 Amendments nor their legislative history explicitly preempted alternative remedies.⁶⁴ The Court rejected the Seventh Circuit's conclusion that section 505(e),⁶⁵ the savings clause in the 1972 Amendments, specifically preserved the federal common law remedy. Section 505(e) of the Act reads: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."⁶⁶ Although a number of federal courts interpreted section 505(e) as preserving federal common law,⁶⁷ the Court was skeptical that the section 505(e) reference to "common law" included federal common law. Justice Rehnquist concluded that Congress intended only to ensure that the availability of citizen-originated suits would not revoke other state common law remedies.⁶⁸ However, the majority attributed critical significance to the section's phrase "nothing in this section" and maintained that a literal reading of the statute did not affect their judgment that the Act as a whole supplanted formerly available federal common law.⁶⁹ Congress, the Court said, clearly preferred that water pollution be regulated through a comprehensive administrative scheme rather than through the ad hoc development of case law.⁷⁰ The Court established the following test for resolving such preemption issues: "[T]he question whether a previously available federal common-law action has been displaced by federal statutory law involves an *assessment of the scope of the legislation* and whether the scheme established by Congress addresses the problem formerly governed by federal common law."⁷¹ Applying this

62. 451 U.S. 304, 317 (1981).

63. *See id.* at 311-24.

64. The Court also interpreted § 510 of the 1972 Amendments, 33 U.S.C. § 1370 (1982), which expressly authorizes the adoption of more stringent effluent standards, to mean only that states may legislate stricter standards with regard to intrastate polluters and that these standards are invalid as applied to interstate disputes. 451 U.S. 304, 327-28 (1981).

65. 33 U.S.C. § 1365(e) (1982). The majority in *Milwaukee II* noted that § 505(e) is "virtually identical to subsections in the citizen-suit provisions of several environmental statutes," and proceeded to list the various saving clause sections employing language similar to § 505(e). 451 U.S. 304, 328-29 & n.21.

66. 33 U.S.C. § 1365(e) (1982).

67. Justice Blackmun related that "[t]o the best of my knowledge, every federal court that has considered the issue has concluded that, in enacting § 505(e), Congress meant to preserve federal as well as state common law." 451 U.S. 304, 340 & n.9 (1981) (Blackmun, J., dissenting); *see also* Hayton, *Groundwater Legal Regime as Instrument of Policy Objectives and Management Requirements*, 22 NAT. RESOURCES J. 119, 134-35 (1982).

68. 451 U.S. 304, 328-29 (1981). Justice Blackmun, in referring to language used by the court of appeals in the case, stated that: "there is nothing in the phrase 'any statute or common law' that suggests that this provision is limited to state common law." *Id.* at 340 (Blackmun, J., dissenting).

69. *Id.* at 328-29; *see infra* text accompanying notes 157-63.

70. 451 U.S. 304, 317 (1981).

71. *Id.* at 315 n.8 (emphasis supplied).

"test" in *Milwaukee II*, the Court noted that Congress considered the 1972 Amendments to be a comprehensive regulatory program,⁷² that the program was to be "supervised by an expert administrative agency,"⁷³ that a permit was required to discharge substances into the environment, and that the area covered by the program was not suited for regulation by a judge-made common law.⁷⁴

3. Sea Clammers

By focusing entirely on Congress' intent regarding preemption and by refusing to inquire into the need for federal common law, the Court in *Milwaukee II* disdained the analysis employed in *Milwaukee I* regarding the need for a federal common law of nuisance.⁷⁵ In *Middlesex County Sewerage Authority v. National Sea Clammers Association* (*Sea Clammers*)⁷⁶ the Court broadly applied its *Milwaukee II* preemption holding. The plaintiffs alleged that discharges into the ocean were harming their fishing grounds and sought both damages and injunctive relief under federal statutes and the federal common law of nuisance.⁷⁷ The Court summarily dismissed the federal common-law claim. In language that was arguably dictum, Justice Powell wrote that the *Milwaukee II* Court had held the federal common law of nuisance in the area of water pollution to be entirely preempted by the more comprehensive scope of the FWPCA.⁷⁸ The Court found the relevant ocean-dumping provisions of the Marine, Protection, Research and Sanctuaries Act of 1972 (MPRSA)⁷⁹ to be nearly identical to the FWPCA regulatory approach and that, consequently, "no cause for [a] different treatment of the preemption question" existed.⁸⁰

Taken together, *Milwaukee II* and *Sea Clammers* could be interpreted as leaving no room for common-law actions involving any category of environmental pollution that has been addressed by "comprehensive" federal legislation.⁸¹ Specifically, the federal statutory framework for controlling hazardous wastes seemingly exhibits the scope and characteristics described in the *Milwaukee II* test.⁸² As such, RCRA and CERCLA have been interpreted to preempt a federal common law of nuisance.

72. *Id.* at 317.

73. *Id.*

74. *Id.* at 325.

75. The approach adopted by the Court in *Milwaukee I* has been described as "essentially an interests analysis that balances federal and state interests in having their own laws apply to particular controversies." Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 HARV. ENVTL. L. REV. 41, 59 (1983).

76. 453 U.S. 1 (1981).

77. *Id.* at 1, 4 & n.6. Plaintiffs successfully maintained the federal common-law claim in the court of appeals, which held that private parties could sue under the common law of nuisance. *National Sea Clammers Ass'n v. City of N.Y.*, 616 F.2d 1222 (3d Cir. 1980).

78. 453 U.S. 1, 21-22 (1981). The Court's comparison of MPRSA to FWPCA apparently only required that there was "no cause for different treatment of the [ocean-dumping] pre-emption question." *Id.* at 22. The main issue in *Sea Clammers* was not whether federal common law of nuisance existed but whether implied private rights of action were available to private plaintiffs. Also, the Court reached its *Sea Clammers* decision without the assistance of briefing or argument regarding the effect of *Milwaukee II*. In his dissent, Justice Stevens criticized this narrow form of statutory review: "The Court's . . . approach . . . is out of step with the Court's own history and tradition." 453 U.S. 1, 25-26 (1981) (Stevens, J., dissenting).

79. 33 U.S.C. §§ 1401-1421 (1982).

80. 453 U.S. 1, 22 (1981).

81. See *Requiem for the Federal Common Law of Nuisance*, 11 ENVTL. L. REP. (ENVTL. L. INST.) 10,191 (1981).

82. See *supra* text accompanying notes 71-74.

B. *Hazardous Waste Regulatory Programs: Federal Common Law of Nuisance is Cut Off at the Pass*

1. *Background: Regulatory Framework and Provisions of the Hazardous Substances Laws*

The current status of federal common law as applied to hazardous waste disposal rests on the interpretation of three federal statutes: the Resource Conservation and Recovery Act (RCRA),⁸³ the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁸⁴ and certain related provisions of the Safe Drinking Water Act (SDWA).⁸⁵ RCRA imposes an ambitious regulatory program upon the transport, handling, and disposal of hazardous waste. CERCLA supplements RCRA by authorizing state and federal governments to institute actions for containment, cleanup, and removal of hazardous wastes. The SDWA requires the EPA to prescribe state programs designed to prevent underground injections, including those of hazardous wastes, which may endanger drinking water sources. A review of the characteristics of the hazardous waste environmental problems and of the corresponding regulatory responses affords the necessary background for analysis of the lower court interpretations.

a. *RCRA*

Faced with the environmental "time-bomb" of hazardous wastes,⁸⁶ Congress began the process of legislating protective measures. The 1976 enactment of RCRA required the EPA to establish a comprehensive program regulating hazardous waste from "cradle-to-grave."⁸⁷ The statute was designed to control the "treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment."⁸⁸ Subtitle C commanded the EPA to identify and list hazardous wastes,⁸⁹ and then to establish standards governing generators,⁹⁰ transporters,⁹¹ and owners and operators of treatment, storage, and disposal

83. 42 U.S.C. §§ 6901-6987 (1982).

84. 42 U.S.C. §§ 9601-9657 (1982).

85. 42 U.S.C. §§ 300i to 300j-10 (1982).

86. The EPA's inventory of uncontrolled sites has swelled to more than 15,000 "and the total is increasing steadily." TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL, OFFICE OF TECHNOLOGY ASSESSMENT: SUMMARY 30 (1983).

87. 45 Fed. Reg. 33,066 (1980); see 42 U.S.C. §§ 6921-6949 (1982); 40 C.F.R. §§ 262-267 (1983). Congress had demonstrated a concern for the problems caused by the disposal of hazardous waste by adopting the Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, 79 Stat. 997 (1965), and the Resource Recovery Act of 1970, Pub. L. No. 91-512, 84 Stat. 1227 (1970), which have been superseded by RCRA. The Toxic Substance Control Act, 15 U.S.C. §§ 2601-2629 (1982), addresses disposal problems posed by toxic chemicals and provides relief in cases involving disposal of "an imminently hazardous chemical substance." *Id.* § 2606(a).

88. 42 U.S.C. § 6902(4) (1982).

89. *Id.* § 6921.

90. *Id.* § 6922.

91. *Id.* § 6923.

facilities.⁹² RCRA required the EPA to promulgate regulations requiring permits for hazardous waste treatment, storage, and disposal facilities.⁹³ The Act also authorized the EPA to delegate to states the responsibility for implementing the regulatory program.⁹⁴

Subtitle G of RCRA includes section 7003, which authorizes the EPA to quickly abate hazardous waste pollution presenting an "imminent and substantial endangerment to health or the environment."⁹⁵ Section 7003 mirrors imminent hazard provisions in previously enacted federal pollution control statutes.⁹⁶

The complex regulatory structure envisioned by Congress has not yet been established.⁹⁷ All the major regulations were issued behind schedule. Moreover, the most important facet of RCRA, the core Subtitle C regulatory program, was not in place until July 1982.⁹⁸ Years after the enactment of RCRA, owners and operators of hazardous waste facilities were subject to limited or no federal regulation. Furthermore, a serious gap in the regulatory framework existed because inactive and abandoned hazardous waste disposal sites⁹⁹ received no specific consideration in RCRA. Congress failed to anticipate the magnitude of the problem created by prior reckless and improper hazardous waste disposal practices, and threats to the environment engendered by existing dormant sites remained.¹⁰⁰

b. CERCLA

On December 11, 1980, after extensive hearings and some last minute amendments, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹⁰¹ to provide for liability, compensation, cleanup,

92. *Id.* § 6924.

93. *Id.* § 6925.

94. *Id.* § 6926. As of November 19, 1980, anyone "owning or operating a facility for the treatment, storage, or disposal of hazardous wastes" must obtain operating permits from the EPA. The formal procedure for notifying the EPA of hazardous waste activities and for applying for permits is set out at 45 Fed. Reg. 12,746 (1980) and 40 C.F.R. §§ 122.4, 122.22, 122.24 (1983).

95. 42 U.S.C. § 6973 (1982).

96. *See, e.g.*, 42 U.S.C. § 300i(a) (1982) (The Safe Drinking Water Act); 33 U.S.C. § 1364 (1982) (The Clean Water Act); 42 U.S.C. § 7410 (1982) (The Clean Air Act); *see also* Skaff, *The Emergency Powers in the Environmental Protection Statutes: A Suggestion for a Unified Emergency Provision*, 3 HARV. ENVTL. L. REV. 298, 302-03 (1979); *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies*, 9 ECOLOGY L.Q. 599, 604 (1981); *infra* notes 344, 351.

97. The federal standards and permit program were to have been published in the Federal Register in April 1978. The first major component of the regulations did not appear until February 26, 1980, followed three months later by a second set of rules. *See infra* text accompanying notes 235-62; *see also* Comment, *EPA Issues RCRA's "Cradle-to-Grave" Hazardous Waste Rules*, 10 ENVTL. L. REP. (ENVTL. L. INST.) 10,130 (1980).

98. *See* Bromm, *EPA's New Land Disposal Standards*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 15,027 (1982).

99. The distinction between abandoned and inactive waste disposal sites lies in the continuing ownership of the latter. A dumpsite has been abandoned when its owners and operators no longer maintain a relationship with it. A site which the current owner controlled while it was used for waste disposal is an inactive site.

100. Gulick, *Superfund: Conscripting Industry Support for Environmental Cleanup*, 9 ECOLOGY L.Q. 524, 538 (1981); Comment, *Hazardous Waste Liability and Compensation: Old Solutions, New Solutions, No Solutions*, 14 CONN. L. REV. 307, 316 (1982).

101. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9657 (1982)).

and emergency response to hazardous substances released into the environment.¹⁰² CERCLA authorizes state and federal governments to institute actions against responsible parties for the containment, cleanup, and removal of hazardous wastes.¹⁰³ The Act also creates a Hazardous Substances Response Fund or "Superfund," jointly financed by industry and the federal government.¹⁰⁴ The fund is available to allow the government compensation for efforts undertaken to contain, cleanup, and remove hazardous wastes if the responsible parties cannot be located or are unable to undertake such activities in a quick and cost-effective manner.¹⁰⁵ Section 107¹⁰⁶ of the Act imposes strict liability for government response costs and damages to natural resources onto responsible parties, subject to specified dollar limits and certain enumerated defenses.¹⁰⁷ The statute also contains section 106, a provision that authorizes judicial action when an imminent and substantial threat to the public health and welfare or to the environment is caused by actual or threatened release of a hazardous substance.¹⁰⁸ Finally, CERCLA requires that a revised "National Contingency Plan" be prepared to reflect and carry out the responsibilities and powers created by the Act.¹⁰⁹

c. SDWA

The Safe Drinking Water Act¹¹⁰ established a regulatory program designed to protect the quality of publicly supplied drinking water in the United States. Part C of the Act mandates regulation of underground injection of fluids through wells,¹¹¹ and requires either individual states or the EPA to administer Underground Injection Control (UIC) programs.¹¹² No injection is allowed that would endanger "drinking water sources,"¹¹³ an injection is proscribed if it may result in the presence of a

102. Congress, in a description of the necessity for CERCLA, specifically found that "[e]xisting law is clearly inadequate to deal with this massive problem [of inactive hazardous waste sites] . . . [and therefore] the need for a strong legislative response is evident." H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 18, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6120 [hereinafter cited as H.R. REP. NO. 1016].

103. 42 U.S.C. § 9604 (1982).

104. *Id.* §§ 9631-9641.

105. *Id.* §§ 9611-9612; *see also* H.R. REP. NO. 1016, *supra* note 102.

106. 42 U.S.C. § 9607(a)(1)-(4) (1982).

107. *Id.* § 9607(b)(1)-(4); *see infra* note 351 and accompanying text.

108. 42 U.S.C. § 9606 (1982). The imminent hazard provision of Superfund provides in part:

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

109. *Id.* §§ 9605, 9607(a)(4)(B); *see infra* note 300.

110. 42 U.S.C. §§ 300f to 300j-10 (1982).

111. *Id.* § 300h. Regulations for the program are found at 40 C.F.R. §§ 144.1-.55, 146 (1983). Underground injection, "the subsurface emplacement of fluids by well injection," 42 U.S.C. § 300(h)(d)(1) (1982), is a relatively inexpensive and potentially widespread hazardous waste disposal practice that can pose serious threats to groundwater sources of drinking water. *See* Tripp & Jaffe, *Preventing Groundwater Pollution: Towards a Coordinated Strategy to Protect Critical Recharge Zones*, 3 HARV. ENVTL. L. REV. 1, 6-7 (1979).

112. 42 U.S.C. § 300h-1 (1982). SDWA provides for states to apply and receive approval for their own UIC programs if they meet EPA minimum requirements. If a state fails to adopt or adequately enforce an approved UIC program the EPA must install its own federally administered program.

113. *Id.* § 300h(b)(1).

contaminant in underground water that supplies or can reasonably be expected to supply any public water system.¹¹⁴ The EPA has developed a classification scheme that assigns active injection wells to one of five categories, according to the substances injected into the well and its proximity to a drinking water source.¹¹⁵ By definition, Class IV wells inject hazardous waste into or above Underground Sources of Drinking Water (USDWs)¹¹⁶ that contain drinking water sources within one-quarter of a mile.¹¹⁷ Recent amendments to the underground injection well regulations promulgated by the EPA prohibit the construction, operation, or maintenance of any hazardous waste injection, unless the well can qualify for one of several exceptions to the prohibition.¹¹⁸

2. Lower Court Developments

Milwaukee II has been heralded as signaling the demise of federal common law.¹¹⁹ Despite the extensive criticism that has been levied against *Milwaukee II* and its broad preemption reading in *Sea Clammers*,¹²⁰ lower courts seem inclined to broadly apply the preemption doctrine. In response to the decisions of the Supreme Court in *Milwaukee II* and *Sea Clammers*, several courts have dismissed federal common-law nuisance claims brought under the FWPCA.¹²¹ These rulings follow the observation of Justice Stevens in *Sea Clammers* that the FWPCA has entirely preempted federal common nuisance law in the area of water pollution.¹²² Courts have nervously begun to examine whether other federal statutes are likewise sufficiently "comprehensive" to supplant the common law.¹²³

The following sections examine the mixed bag of judicial activities defining the existence and contours of a federal common law governing hazardous waste disposal. An increasing number of lower courts are addressing the effect of RCRA and

114. *Id.* § 300h(d)(2). The contamination must degrade the water system such that either a violation of national primary drinking water standards or adverse health effects may be expected.

115. The classification scheme is described at 40 C.F.R. § 146.5 (1983).

116. The definition of Underground Source of Drinking Water (USDW) is supplied at 40 C.F.R. § 146.3 (1983). The EPA's Response to Comments about General Program Elements, which prefaces the promulgation of final rules prescribing UIC programs, includes in the "E. Class IV Ban" section the statement that "the Agency [decided] to adopt a very broad definition of USDWs [Underground Source of Drinking Water]. This broad definition ensures that any aquifer even *potentially* useable as drinking water will be considered a USDW . . ." 49 Fed. Reg. 20,138, 20,141 (1984) (emphasis added).

117. 40 C.F.R. § 144.6(d) (1983).

118. Amendments to the Underground Injection Control Program, 49 Fed. Reg. 20,138, 20,141 (1984) (to be codified at 40 C.F.R. §§ 144.13, 144.23).

119. See *supra* text accompanying notes 78-82.

120. See, e.g., Note, *Preemption of Federal Common Law—City of Milwaukee v. Illinois*, 31 DE PAUL L. REV. 201 (1981).

121. See, e.g., *Illinois v. Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982); *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981); *Chicago Park Dist. v. Sanitary Dist.*, 530 F. Supp. 291 (N.D. Ill. 1981); *Love v. New York State Dep't of Envtl. Conservation*, 529 F. Supp. 832 (S.D.N.Y. 1981).

122. 453 U.S. 1, 21-22 (1981). But see *Oklahoma v. Arkansas*, No. 93 Orig. (U.S. filed May 24, 1982, leave to file bill of complaint dismissed, Aug. 7, 1983) (Petitioner's claim relied on the continuing availability of federal nuisance law in the interstate water pollution context.).

123. At least three courts have held that the Clean Air Act may operate to preclude federal common-law nuisance actions. See *New England Legal Found. v. Costle*, 666 F.2d 30 (2d Cir. 1981); *Connecticut v. Long Island Lighting Co.*, 535 F. Supp. 546 (E.D.N.Y. 1982); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982).

CERCLA on federal common law. District courts have ruled that the two Acts, because of their comprehensive natures, occupy the field of hazardous waste disposal and therefore preclude federal common-law nuisance claims. Courts entertaining various other claims arising under RCRA and CERCLA have also adopted the conclusion that federal common-law nuisance actions are not available in hazardous waste litigation. However, the courts have exhibited divergent approaches to questions concerning the availability of a federal common law of liability as preserved by specific provisions in the two Acts.

a. *Federal Common-Law Nuisance Claims*

At least two courts to date have applied the *Milwaukee II* ruling and dismissed claims founded upon the federal common law of nuisance, finding the claims preempted by federal hazardous waste legislative action.¹²⁴ In *United States v. Price* the United States brought an action seeking injunctive relief from the hazards posed by chemical dumping.¹²⁵ The lawsuit was brought pursuant to section 1431¹²⁶ of the SDWA and section 7003¹²⁷ of RCRA, and included a claim arising under the federal common law of nuisance.¹²⁸ District Judge Brotman observed that the claim did not present a "proper area for the development of federal common law,"¹²⁹ because the intrastate pollution at issue "neither require[d] a uniform federal rule of decision nor implicate[d] important federalism concerns."¹³⁰ The court also ruled that even if federal common law were available, it would have been preempted by the enactment of RCRA and CERCLA.¹³¹ The court relied on *Milwaukee II* and concluded that the scope of federal court lawmaking authority is limited when Congress has articulated the appropriate standards to be applied as a matter of federal law.¹³² Citing *Sea Clammers*, Judge Brotman briefly concluded that "[t]he comprehensive nature of the schemes established by RCRA and the CERCLA requires us to conclude that, if federal common law ever governed this type of activity, it has since been preempted

124. Another case dismissing a federal common-law nuisance claim for injunctive relief from hazardous waste disposal, *United States v. Diamond Shamrock Corp.*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 20,819 (N.D. Ohio 1981), did not reach the issue whether federal common law of nuisance has been preempted by the federal statutes. The court dismissed the claim for plaintiff's failure to allege interstate effects of the pollution. See *infra* text accompanying notes 318-23.

125. 523 F. Supp. 1055, 1057 (D.N.J. 1981).

126. 42 U.S.C. § 300i (1982).

127. 42 U.S.C. § 6973 (1982).

128. 523 F. Supp. 1055, 1057 (D.N.J. 1981).

129. *Id.* at 1069.

130. *Id.* Included in the court's findings of fact was a determination that the intrastate pollution included private wells in the area contaminated or likely to be contaminated. Wells producing an average of 41% of Atlantic City's daily water consumption were also found to be in imminent danger of serious contamination. *Id.* at 1065-66.

131. *Id.* at 1069.

132. *Id.* Courts have used this language to fashion a rebuttable presumption that federal statutes preempt federal common law. See *infra* text accompanying notes 197-99.

by those statutes."¹³³ The district court consequently granted defendant's motion for summary judgment with respect to the government's federal common-law claims.¹³⁴

The second case to address the federal common-law preemption question in the hazardous waste area was *City of Philadelphia v. Stepan Chemical Co.*¹³⁵ In *Stepan*, the City of Philadelphia sought recovery for costs and damages resulting from illegal industrial waste dumping on city property, alleging that the illegal dumping contaminated the soil at the city-owned landfill, the groundwater underlying the site, and the adjacent Delaware River.¹³⁶

The City characterized its federal common-law nuisance claim as one for interstate groundwater contamination, and argued that since neither *Milwaukee II* nor *Sea Clammers* involved groundwater pollution, the claim did not require dismissal.¹³⁷ The district court accorded this distinction little merit and read the complaint as being premised upon illegal disposal of hazardous waste.¹³⁸ Judge Ditter, although recognizing the availability of a federal common-law nuisance action for the abatement of resulting hazardous conditions,¹³⁹ concluded that "Congress has occupied the hazardous waste disposal area by virtue of two comprehensive enactments" (RCRA and CERCLA).¹⁴⁰

In its opinion, the court reviewed the regulatory schemes established by Congress:

Unquestionably, Congress has occupied the field of hazardous waste disposal. In the RCRA it has comprehensively set forth the standards which are to govern every aspect of this activity from generation to disposal. In CERCLA, it has established a system of responding to releases or threatened releases from hazardous dumpsites, mandated the adoption of an extensive plan to govern such responses, and imposed a standard of strict liability on those parties involved in the disposal of hazardous waste.¹⁴¹

After quoting *Price* with approval,¹⁴² Judge Ditter granted a motion for judgment on the pleadings in favor of defendants.¹⁴³

133. 523 F. Supp. 1055, 1069 (D.N.J. 1981).

134. *Id.* The government appealed the district court's denial of its application for preliminary injunction. The Third Circuit affirmed the decision of the trial court, commenting on the availability of equitable relief under the RCRA and SDWA imminent hazard provisions. *United States v. Price*, 688 F.2d 204, 208 (3d Cir. 1982). In its opinion, the court of appeals did *not* comment on the district court's dismissal of the government's federal common-law nuisance claim.

135. 544 F. Supp. 1135 (E.D. Pa. 1982).

136. *Id.* at 1139. The City of Philadelphia was forced to postpone the construction of a sewage recycling center and undertake a comprehensive cleanup program. The nine-count complaint sought recovery of 30 million dollars in damages and civil penalties, claiming relief under CERCLA and the CWA, two Pennsylvania environmental statutes and various Pennsylvania code provisions, state common law trespass and nuisance, and the federal common law of nuisance. *Id.* at 1139-40.

137. *Id.* at 1147.

138. *Id.*

139. The *Stepan* opinion noted the result in *United States v. Solvent Recovery Servs.*, 496 F. Supp. 1127 (D. Conn. 1980), in which the court allowed a federal common-law nuisance claim for contamination of groundwater resulting from illegal dumping of hazardous waste. 544 F. Supp. 1135, 1147 n.23 (E.D. Pa. 1982). However, the *Solvent* decision was handed down prior to the *Milwaukee II* ruling and relied heavily on the availability of federal common law as supported in *Milwaukee I*. *United States v. Solvent Recovery Servs.*, 496 F. Supp. 1127, 1134 (D. Conn. 1980).

140. 544 F. Supp. 1135, 1147 (E.D. Pa. 1982).

141. *Id.* at 1148.

142. *Id.*

143. *Id.*

Although no other court to date has ruled on a motion to dismiss a claim premised on the federal common law of nuisance, several opinions have accepted the application of *Milwaukee II* in the context of hazardous waste disputes. In a preliminary ruling, the court in *United States v. Outboard Marine Corp.*¹⁴⁴ denied defendant's motion to dismiss a government action brought under the CERCLA imminent hazard provision. The EPA sought injunctive relief from alleged releases of polychlorinated biphenyls (PCBs) into navigable waters.¹⁴⁵ In determining the reach of section 106(a),¹⁴⁶ the court refused to rely "on 'the public interest and the equities of the case.'" The court explained that "[r]ecourse to the federal common law of nuisance seems to be foreclosed by *Milwaukee II*."¹⁴⁷

Two other district courts have openly declared their acceptance of the *Price* and *Stepan* rulings. In *United States v. Waste Industries*¹⁴⁸ the EPA filed suit seeking injunctive relief to protect various water resources from toxic contaminants leaching from an abandoned inactive waste disposal site.¹⁴⁹ In dicta, the court analyzed whether substantive standards of decision under section 7003¹⁵⁰ could issue from the federal common law of nuisance, and determined that "[a]pplication of the *Milwaukee II* standard leads this court to conclude that the RCRA has preempted the federal common law of nuisance in the area of hazardous waste management."¹⁵¹

Similarly, in *United States v. Northeastern Pharmaceutical and Chemical Co.*¹⁵² the court concluded in a footnote that the federal common law governing hazardous waste activities, because preempted by the relevant statutes, could not provide authority for defendant's liability.¹⁵³

b. Congressional Intent to Preserve Federal Common Law

Conspicuous because of its absence from the *Price* and *Stepan* opinions is an analysis of express congressional intent vis-a-vis the preemption of federal common-law remedies. Judge Brotman correctly interpreted *Milwaukee II* as requiring deference to federal legislation that articulates the standards to be applied as a matter of

144. 556 F. Supp. 54 (N.D. Ill. 1982).

145. *Id.*; see *Oklahoma v. Arkansas*, *supra* note 122.

146. 42 U.S.C. § 9606(a) (1982).

147. 556 F. Supp. 54, 57 (N.D. Ill. 1982). It is unclear whether the court's reference to *Milwaukee II* related to the federal common law of nuisance as pertaining to navigable waters, federal common law of nuisance as regards hazardous substances, or federal common law of nuisance in any environmental context. The passage invoking *Milwaukee II*'s preemption ruling appears in the section of the opinion addressing the source of substantive law to be applied in a CERCLA § 106(a) action, implying that the court believes that the federal common law of nuisance in CERCLA-type hazardous substance actions is preempted.

148. 556 F. Supp. 1301 (E.D.N.C. 1982), *rev'd*, *United States v. Waste Indus.*, 734 F.2d 159 (4th Cir. 1984). The decision of the Court of Appeals is reviewed *infra* notes 337-52.

149. 556 F. Supp. 1301, 1302-03 (E.D.N.C. 1982).

150. 42 U.S.C. § 6973 (1982). The interpretation and application of the RCRA and CERCLA imminent hazard provisions are briefly reviewed *infra* notes 344, 351 and accompanying text.

151. 556 F. Supp. 1301, 1315-16 (E.D.N.C. 1982) (footnote omitted). The magistrate in the case had recommended application of the common law of nuisance in the government's action. The court noted that the magistrate's decision was rendered prior to *Milwaukee II*. *Id.* at 1315 n.27.

152. 579 F. Supp. 823 (W.D. Mo. 1984).

153. *Id.* at 837-38 n.13.

federal law.¹⁵⁴ However, the conclusion reached in *Price*, that Congress implicitly intended the RCRA and CERCLA programs to preempt the development of a federal common law of hazardous waste pollution, is incorrect if Congress expressly preserved the use of federal common law. The terms of a statute explicitly preserving or preempting judge-made law should be controlling, as should clear evidence of congressional intent to achieve such results.¹⁵⁵ As one commentator has explained:

[O]nce a court determines that Congress has expressed its intent regarding the use of federal common law, that intent controls and all inquiry ends.

. . . [A] court should look for either an express savings or preemption provision in the statute or express and uncontroverted evidence of preemptive intent in the legislative history.¹⁵⁶

Implying congressional intent is unnecessary if express statutory language preserves the federal common law. The savings clause in RCRA¹⁵⁷ contains language substantially identical to section 505(e) of the Clean Water Act (CWA).¹⁵⁸ The Supreme Court disagreed that the CWA savings clause preserved federal common-law actions, reading the provision to mean that the authorization of citizen-suits does not revoke other remedies.¹⁵⁹ Particularly, the majority pointedly responded to Justice Blackmun's criticism:

[T]he dissent, in relying on section 505(e) as evidence of Congress' intent to preserve the federal common-law nuisance remedy, must read "nothing in this section" to mean "nothing in this Act." We prefer to read the statute as written. *Congress knows how to say "nothing in this Act" when it means to.*¹⁶⁰

The Court's recognition of the dissent's position that Congress may have intended to say "nothing in this Act" is noteworthy. While section 7002(f) of RCRA tracks the FWPCA citizen-suit provision and reads "nothing in this section,"¹⁶¹ Congress broadened the language of CERCLA's savings clause to provide that nothing in the *entire Act* preempts state or federal laws:

154. See *supra* text accompanying notes 125-34.

155. *In re Oswego Barge Corp.*, 664 F.2d 327, 339 (2d Cir. 1981).

156. Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 HARV. ENVTL. L. REV. 41, 60 (1983).

157. 42 U.S.C. § 6972(f) (1982):

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

See *infra* note 161.

158. See *supra* text accompanying note 66.

159. *City of Milwaukee v. Illinois*, 451 U.S. 304, 327-29 (1981); see *supra* text accompanying notes 67-70.

160. 451 U.S. 304, 329 n.22 (emphasis supplied) (*citing* the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 114(a), 94 Stat. 2795 (1980)) (codified at 42 U.S.C. § 9614 (1982)). The section cited by the Court, entitled "Relationship to other law," provides that "Nothing in this chapter shall be construed or interpreted as preempting any state from imposing any additional liability or requirements with respect to the release of hazardous substances within such state." The words "this chapter" originally appeared as "this Act" in Pub. L. No. 96-510, 94 Stat. 2767 (1980) (CERCLA).

161. 42 U.S.C. § 6972(f) (1982). "As stated in the Committee report which accompanied RCRA: 'Subsection (f) preserves any rights that a party to litigation would have under any other statutes or common law to seek the enforcement of any standard or requirement relating to the management of discarded materials.'" HAZARDOUS WASTE CONTROL AND

Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination in part or whole of policy regarding the inapplicability of strict liability.¹⁶²

Justice Rehnquist's pointed reference to the CERCLA statutory language underscores that, reading "the statute as written," section 302(d) of CERCLA is evidence of Congress' intent to preserve the federal common-law remedy.

The distinction between the savings clause in CERCLA and that in the FWPCA manifests the desire of Congress to save other remedies for hazardous waste pollution. This distinction was not mentioned in either *Price* or *Stepan*. This omission in each court's analysis is particularly troublesome. The marked difference in statutory language renders the Supreme Court's determination that subsection 505(e) "most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common-law actions"¹⁶³ inapplicable to CERCLA.

The unique interpretation given to the savings clause of the CWA would apply to section 7002(f), the similar RCRA savings clause.¹⁶⁴ Section 7002(f), unlike the savings clause in CERCLA, could not be relied upon to exhibit express congressional desire to preserve federal common-law remedies. Assuming the scope and nature of RCRA implicitly betray congressional intent to displace a federal common-law approach, this preemption would extend to government regulation of the transport, handling, and disposal of hazardous waste occurring after RCRA's effective date.¹⁶⁵

Enforcement Act of 1983, H.R. REP. NO. 198, 98th Cong., 1st Sess. pt. 1, at 49 (1983) [hereinafter cited as *RCRA Reauthorization*].

The House of Representatives passed a bill reauthorizing RCRA on November 3, 1983. 129 CONG. REC. H9133-84 (daily ed. Nov. 3, 1983). Section 11(c) of H.R. 2867, entitled "Preservation of Other Rights," amended § 7002(f), 42 U.S.C. § 6972 to read "[N]othing in this Act." *RCRA Reauthorization*, *supra*, at 49 (emphasis supplied). The committee report on the RCRA bill explained the amendment:

[S]ince the passage of RCRA, the Supreme Court overlooked language virtually identical to Section 7002(f) in Section 505(e) of the Clean Water Act and held that Congress did not intend to preserve the federal common law after passage of the Clean Water Act. . . . Therefore, the Committee has amended Section 7002(f) of RCRA to read "Nothing in this Act" in order to continue to preserve the complete rights of litigants as intended by Congress. This amendment is suggested by the Court as the appropriate manner to evidence such Congressional intent.

Id.

The Senate Environment Committee reported a similar bill, S. 757, S. REP. NO. 284, 98th Cong., 1st Sess. (1983), that did not contain a provision similar to § 11(c) of H.R. 2867. The Conference Report on H.R. 2867 Hazardous and Solid Waste Amendments of 1984, *filed*, 130 CONG. REC. H11,103 (daily ed. Oct. 3, 1984) (*to be reported* H. REP. NO. 98-1133 [hereinafter cited as Conference Report]), failed to adopt the House amendment, explaining that "[f]ailure to adopt the House amendment does not preclude the use of common law principles by the Federal courts in interpreting the provisions (such as section 7003) of RCRA." *Id.* at H11,125, 11,140 (Joint Explanatory Statement at the Committee of Conference) (emphasis supplied) [hereinafter cited as Joint Explanatory Statement]. The House and Senate agreed to the Conference Report in the last days of the 98th Congress. *Id.* at H11,144; 130 CONG. REC. S13823 (daily ed. Oct. 5, 1984). President Reagan signed the amendments into law on Nov. 9, 1984. [15 Current Developments] ENV'T REP. (BNA) 1243 (Nov. 16, 1984). Of course, the failure to clarify a statute's language eight years after its passage is not conclusive evidence of the Legislature's original intent.

162. Pub. L. No. 96-510, § 302, 94 Stat. 2808 (codified at 42 U.S.C. § 9652 (1982)). The phrase "this Act" referred to in the text was changed in the codification process to "this chapter." See *supra* note 69.

163. 451 U.S. 304, 329 (1981).

164. The literal construction of § 505(e) was considered by Justice Blackmun to be an extremely strained reading of the statutory language. 451 U.S. 304, 342 (1981) (Blackmun, J., dissenting). The dissent preferred construing the reference to "this section" as simply preventing preexisting rights of action from being subjected to the procedural and jurisdictional limitations imposed by § 505(e) on persons who would sue under the Act. *Id.*

165. RCRA was enacted as Pub. L. No. 94-580, 90 Stat. 2795 (1976).

Arguably, the enactment of CERCLA provides only an additional set of statutory remedies for the federal government, and section 302(d) does not revive any federal common law already preempted by RCRA.¹⁶⁶

This narrow view of the intent expressed in CERCLA's savings clause can be rejected on a number of grounds. First, hazardous waste problems unaddressed by RCRA should be amenable to federal common-law solutions. Second, any hazardous substance release related to activities occurring or concluding before RCRA's effective date should arguably not be regulated under RCRA,¹⁶⁷ and therefore could be a hazardous substance release to which CERCLA and its savings provision apply. Finally, the availability of federal common-law *remedies* with respect to releases of hazardous substances should also be unaffected, because preemption of federal judicial powers over toxic waste disposal regulatory *standards* does not disturb CERCLA's preservation of traditional equitable federal common-law nuisance *remedies*.¹⁶⁸ Thus, the statutory remedies available under CERCLA are accompanied by an express preservation of federal common law affecting the obligations or liabilities of persons with respect to releases of hazardous substances.¹⁶⁹

However, the argument that CERCLA preserves only the federal common law not preempted by RCRA contains a fundamental inconsistency. The analytical neatness of a dissection between the RCRA and CERCLA "fields" of hazardous waste regulation quickly blurs when the two statutes are examined together. CERCLA was designed to close some of RCRA's regulatory gaps, and established a response system to releases or threatened releases from hazardous dumpsites. The Act also required reporting and recordkeeping for present and former hazardous waste sites.¹⁷⁰ CERCLA is primarily directed toward the cleanup of designated inactive hazardous waste dumpsites. Nevertheless, the statute operates both to supplement the RCRA regulatory approach and to provide a means of financing responses to environmental hazardous waste threats.¹⁷¹ CERCLA "picks up where

166. See Trauberman, *Common Law Nuisance in Hazardous Waste Litigation: Has it Survived Milwaukee II?*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,043, 10,045 (1983).

167. Courts have divided with regard to the retroactive nature of RCRA's imminent hazard provision. See *United States v. Waste Indus.*, 734 F.2d 159, 165 (4th Cir. 1984) (Congress intended to apply the imminent hazard provisions to disposals of hazardous waste that may present substantial endangerment.). But see Joint Explanatory Statement, *supra* note 161, at H11,137 (section 402 of the Hazardous and Solid Waste Amendments clarifies that section 7003 of RCRA is retroactive).

168. The facts and opinion of *Milwaukee II* support this observation. The Court rejected the imposition of standards more stringent than those provided by the genuine effluent limitations developed by the EPA. The Court also pronounced the lower court's application of nuisance and equity concepts inappropriate when imposed on a field already subject to comprehensive administrative regulation. 451 U.S. 304, 317 (1981). Likewise, if RCRA results in a preemption similar to that in the 1972 Amendments, a federal court would be obligated to review the claims of hazardous waste litigants under the standards articulated by Congress and refined by an expert administrative agency. A different result should obtain, however, when claimants are demanding remedial action or relief from actions not subject to RCRA regulatory provisions. See *infra* text accompanying notes 236-64, 282-96, 333.

169. See *infra* notes 344, 351, and accompanying text.

170. See *supra* text accompanying notes 101-09; see also Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund*, 57 NOTRE DAME LAW. 260, 268 (1981). Indeed, CERCLA was originally proposed as a "multi-faceted federal regulatory scheme." *Id.* at 267.

171. See generally Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

RCRA leaves off" and joins with RCRA "to form a sufficient authorization to begin the cleanup of old hazardous waste sites."¹⁷² The relationship between the CERCLA and RCRA programs is such that neither statute is considered in isolation.¹⁷³ Recent case developments confirm that suits of the type previously brought under RCRA's imminent hazard provision now can be maintained under CERCLA's imminent hazard provision.¹⁷⁴ A narrow reading of the CERCLA savings clause, limiting the section's preserving effect to common law not preempted by RCRA, emasculates the legislative purpose enunciated in section 302(d).

Clear congressional intent to impose supplementary and complimentary liability on enterprises releasing hazardous substances is further demonstrated in section 107(j). This section provides exemptions for various "federally-permitted releases," but states that:

Recovery by any person (including the United States or any State) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.¹⁷⁵

This provision, read together with the expansively drafted savings clause, is a clear expression of a congressional intent to preserve federal common law.¹⁷⁶ The *Price* and *Stepan* courts completely disregarded these provisions with reference to the federal common law of nuisance claims. Yet, each court relied on the unified, comprehensive legislative approach as presented by the combined operation of the two Acts to infer congressional intent to preempt federal common law.¹⁷⁷ The analysis utilized by each court encounters a fundamental dilemma. If *Price* and *Stepan* rely upon the interaction of RCRA and CERCLA to establish *Milwaukee II*-type "comprehensiveness," the courts cannot selectively ignore section 302(d), section 107(j), and their preserving scope. *Milwaukee II* interpreted the CWA savings clause to lack a declaration of congressional intent to preserve alternative federal theories of recovery. An interpretation of the CERCLA savings clause produces the opposite result, for the provision expressly provides that the Act as a whole will not affect remedies under other federal or state law, including common law.

The *Milwaukee II* Court was also skeptical that section 505(e)'s preservation of "common law" included federal common law. The Court observed that, for the most

172. *Id.* at 2, 35-36.

173. See *United States v. Waste Indus.*, 556 F. Supp. 1301, 1316 (E.D.N.C. 1982) ("Because of the passage of Superfund, this court need not consider a claim under section 7003 in isolation.").

174. See *infra* notes 344, 351 and accompanying text.

175. 42 U.S.C. § 9607(j) (1982).

176. See Bleiweiss, *supra* note 75, at 69; Collins, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance*, 11 B.C. ENVTL. AFF. L. REV. 297, 406 (1984); Trauberman, *Common Law Nuisance in Hazardous Waste Litigation: Has it Survived Milwaukee II?*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,043, 10,045 (1983).

177. See *supra* text accompanying notes 87-109.

part, the legislative activity producing the 1972 Amendments occurred prior to the *Milwaukee I* decision.¹⁷⁸ As such, the drafting of the Clean Water Act Amendments presumably did not reflect the legislature's awareness of the federal common law.¹⁷⁹

No such skepticism can be directed to section 302(d), for CERCLA was drafted against a decade-long history of unprecedented federal common-law development and expansion.¹⁸⁰ Furthermore, the legislative history reveals a significant congressional awareness, throughout the drafting and compromise enactment process, of federal common-law nuisance principles.¹⁸¹

The *Price* and *Stepan* courts failed to accord proper significance to the expansive sweep of CERCLA's savings clause. As a result, their findings of preemption may well misconstrue congressional intent. Given the courts' expressed concern with congressional purpose, their disregard of express statutory language and failure to investigate legislative intent are particularly troublesome.

III. FEDERAL COMMON LAW OF NUISANCE AND THE *Milwaukee II* PREEMPTION STANDARD

Since the *Milwaukee II* decision, lower courts have exhibited a general reluctance to entertain traditional federal common-law nuisance claims that raise environmental issues previously addressed by Congress. This reluctance to wield judicial lawmaking power overcomes even clear legislative intent to preserve common law. Furthermore, it appears likely that the federal courts will continue to apply mechanically the broadest preemption rationale of *Milwaukee II*.¹⁸²

This trend is well documented in the hazardous waste context. Hazardous substance disposal provisions are apparently similar in nature to the water pollution statutes. The courts in *Price*, *Stepan*, and related cases relied on this apparent similarity to follow the *Milwaukee II* lead and to infer a displacement of federal common law.

The various lower courts appeared satisfied that the complex congressional legislative enactments designed to address the dangers of hazardous waste disposal met the *Milwaukee II* preemption test.¹⁸³ In both *Price* and *Stepan*, the crucial inquiry became whether or not the acts were sufficiently "comprehensive" to supplant the

178. 451 U.S. 304, 327 n.19 (1981).

179. *Id.* There seemed to be little reason for Congress to distinguish between the preservation of state versus federal common-law damages. Justice Blackmun referred to the legislative history accompanying the 1972 legislation and concluded that not only did Congress intend no distinction between the common law of the individual states and federal common law, but it was specifically aware of the presence of federal common law. 451 U.S. 304, 343 (1981) (Blackmun, J., dissenting).

180. Yet the federal common law of nuisance "has [recently] undergone nothing short of revolutionary growth." *Federal Common Law of Nuisance Reaches New High Water Mark as Supreme Court Considers Illinois v. Milwaukee II*, 10 ENVTL. L. REP. (ENVTL. L. INST.) 10,101 (1980).

181. See *infra* notes 336-51 and accompanying text.

182. Collins, *supra* note 176, at 406.

183. See *supra* text accompanying notes 124-53.

common law.¹⁸⁴ However, the inference drawn from the "comprehensiveness" of the 1972 Amendments, that Congress intended its program to exclude all related common-law development, was only one of several criteria the majority considered in arriving at its preemption conclusion.¹⁸⁵

An application of a *Milwaukee II* "assessment"¹⁸⁶ involves a scrutiny of all the factors identified by the Court as significant. This scrutiny demonstrates that the generalized analysis used by the two federal district courts does not support the complete preemption of federal common law. Further, as will be shown in part IV, these lower courts have ignored hazardous waste statutory policy by denying appropriate federal common-law remedies expressly and implicitly preserved by Congress.

A. The Comprehensiveness Factor and Implied Intent to Preempt General Federal Common Law

The Court in *Milwaukee II* attached great significance to statements reported in the statute's history revealing the legislature's perception of the Act as "comprehensive" and "all-encompassing."¹⁸⁷ The Court interpreted these comments as implying that the label "comprehensive" "strongly suggests"¹⁸⁸ an express resolve to displace judicial activism and federal court lawmaking.¹⁸⁹

Similar language can be discovered in the legislative history of the hazardous waste acts. In its report on RCRA, the House Committee on Interstate and Foreign Commerce stated that "the approach taken by this legislation [RCRA] eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes," and that RCRA "addresses the problem of the disposal of hazardous wastes in a comprehensive manner, including consideration of the generation of hazardous wastes; the transportation; . . . treatment; storage; and disposal of such waste."¹⁹⁰ In *United States v. Waste Industries* the court directly referred to these pronouncements and concluded that Congress felt RCRA joined previously enacted legislation to form a unified scheme of environmental protection.¹⁹¹ Neither *Price* nor *Stepan* openly referred to this legislative "self-

184. 544 F. Supp. 1135, 1147-48 (E.D. Pa. 1982); 523 F. Supp. 1055, 1069 (D.N.J. 1981); see *Requiem for the Federal Common Law of Nuisance*, 11 ENVTL. L. REP. (ENVTL. L. INST.) 10,191, 10,195 (1981); see also Hinds, *Liability under Federal Law for Hazardous Waste Injuries*, 6 HARV. ENVTL. L. REV. 1, 10-12 (1982).

185. 451 U.S. 304, 319 (1981). Writing for the majority, Justice Rehnquist stated that "[t]he establishment of such a self-consciously comprehensive program . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Id.* at 319 (emphasis added). The Justice then turned to the facts relating to the particular NPDES (National Permit Discharge Effluent System) permit that was before the Court and held specifically that Congress had spoken the last word on the abatement of pollution from NPDES sources. *Id.* at 319-22.

186. See *supra* text accompanying notes 71-74.

187. 451 U.S. 304, 317-18 (1981).

188. *Id.* at 319.

189. "The majority continually cites to the legislative record that the Act was intended to be a comprehensive program for controlling water pollution as though the use of the word 'comprehensive' was indicative of congressional intent to exclude all other attempts to abate water pollution." Collins, *supra* note 176, at 366.

190. H.R. REP. NO. 1491, 94th Cong., 2d Sess. 4-5 (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6238, 6241-43, 6254 [hereinafter cited as H.R. REP. NO. 1491].

191. 556 F. Supp. 1301, 1315 (E.D.N.C. 1982).

consciousness" to support their rulings. Instead, both courts preferred to imply congressional intent from the apparent comprehensiveness of the programs alone, allowing the enactments to "speak for themselves" concerning a congressional determination to preempt the hazardous waste area.¹⁹²

1. *Criticism of the Comprehensiveness Standard*

Reliance upon the facial appearance or Legislature's designation of a statute as comprehensive is an unconvincing test for congressional intent. The majority opinion in *Milwaukee II* ostensibly is not based upon constitutional principles delineated by the Supreme Court,¹⁹³ but rather upon a controversial reading of congressional intent.¹⁹⁴ A preemption of common-law remedies should not be compelled by the unrelated observation that Congress has "spoken" to a problem area.¹⁹⁵ Justice Blackmun points out in his *Milwaukee II* dissent that the cases relied upon by the majority support an accession to the particularized judgment of Congress only when the Court "confronted a statute that had created a *precise* federal remedy where before there had been none."¹⁹⁶

In its analysis, the Court implies that the precision of the legislative approach will assume a significance in the preemption test.¹⁹⁷ Indeed, the majority opinion in *Milwaukee II* makes a significant statement refining the applicability of the "comprehensiveness" test: "Since federal courts create federal common law only as a necessary expedient when problems requiring federal answers are not addressed by federal statutory law . . . the comprehensive character of a federal statute is quite relevant. . . ."¹⁹⁸ While comprehensiveness is *relevant*, it should not be *controlling*,¹⁹⁹ particularly when a court decides that even within the context of a

192. *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1147-48 (E.D. Pa. 1982); *United States v. Price*, 523 F. Supp. 1055, 1069 (D.N.J. 1981).

193. 451 U.S. 304, 316 n.8 (1981).

194. *See Hearings before the Subcomm. on Environmental Pollution of the Comm. on Environment and Public Works*, 97th Cong., 2d Sess. 572, 650-55 (1982) [hereinafter cited as 1982 RCRA Hearings].

195. *See supra* text accompanying notes 39-42, 47; *accord* *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *see also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 2-1 to 2-4 (1978).

196. 451 U.S. 304, 338 n.7 (1981) (Blackmun, J., dissenting) (emphasis added).

197. *But see* *Illinois v. Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982). The court analyzed the holdings in *Milwaukee II* and *Sea Clammers* and concluded that the comprehensiveness test was appropriate and "not . . . the fact that the amendments addressed some aspect of the problem in a particular way." *Id.* at 478. The opinion further established that the question addressed by Congress was the entire question of water pollution and displacement was concomitantly broad. *Id.*

198. 451 U.S. 304, 319 n.14 (1981).

199. Still, several courts have expansively interpreted the *Milwaukee II-Sea Clammers* comprehensiveness test. *See* *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 702 (D.N.J. 1982) (concluding that since Congress had "addressed" the problem of air pollution in the Clean Air Act, the statute preempts any federal common-law nuisance claims). *But see* *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 475 (7th Cir. 1982) ("Federal common law . . . is thus appropriate only when a court is compelled to consider a federal question to which Congress has not provided an answer."). *See also* *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981). In this action filed by the federal government to obtain cleanup costs against parties charged with liability for oil spills, the Second Circuit determined that the claims based on federal common law of nuisance were preempted by the 1972 Amendments. The court interpreted *Milwaukee II* to require a presumption of legislative preemption of judge-made law. The court identified

complex regulatory scheme "problems requiring federal answers" are left without remedies.²⁰⁰ In *Mobil Oil Corp. v. Higginbotham*²⁰¹ the Supreme Court elaborated on this principle, indicating that "when [Congress] does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless."²⁰²

In *Milwaukee II* the Court appears to have lowered its former standard of statutory review. *Milwaukee II*'s displacement of federal common law involved "an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem."²⁰³ However, this passage indicates that standing alone, the preenactment characterization of legislation as "comprehensive" would fail to supply the necessary information concerning the scope of the legislative regulatory scheme actually established. Accordingly, congressional intent "to be comprehensive," as reflected in the legislative histories and the detail of regulatory programs, does not automatically translate into congressional intent "to displace" federal common law.

A plausible argument can be made to distinguish the hazardous waste regulatory programs from the 1972 Amendments analyzed in *Milwaukee II* and *Sea Clammers*. Two positions can be advanced to discredit the *Stegan* and *Price* wholesale application of the *Milwaukee II* comprehensiveness standard: first, that congressional declarations of intent regarding the scope of RCRA and CERCLA are exceedingly unreliable; and second, that any conjectural intent to provide an exhaustively comprehensive regulatory scheme to address the hazardous waste problems has been frustrated.

The legislative histories of RCRA and CERCLA are spotty, because both Acts were rushed through Congress with little or no debate during a session's final hours.²⁰⁴ The confidence expressed in the contemporaneous legislative history of RCRA that hazardous waste "loopholes" were being sealed was quickly shattered. Subsequent to the passage of RCRA, Congress admitted that the Act was "clearly

factors . . . relevant to an assessment of whether the presumption of preemption has been overcome . . . includ[ing] the scope of the preempting legislation, its detail and comprehensiveness, whether the judge-made law is filling a gap in legislation or effectively rewriting the statute, and how well established the judge-made law was at the time of the statute's passage.

Id. at 342-43.

200. The Court in *Milwaukee II* expressly narrowed its holding: as the reviewed discharge situation left no "interstice" to be filled by federal common law, the preemption applied "at least so far as concerns the claims of respondents." 451 U.S. 304, 317, 323 (1981). *But see* Collins, *supra* note 176, at 367-69 (discussing the inadequacies of the CWA giving rise to Illinois' claim before the Supreme Court). This has provoked some questions, despite the *Sea Clammers* dictum, concerning the scope of the FWPCA preemption effect. *See* *Oklahoma v. Arkansas*, No. 93 Orig. (U.S. filed May 24, 1982, leave to file bill of complaint dismissed, Aug. 7, 1983) (Although Congress intended a comprehensive scheme, the absence of phosphate and nutrient discharge regulation constitutes an actionable interstice.); *see also* Comment, *Federal Water Pollution Remedies: Non-Statutory Remedies are Eliminated*, 17 LAND & WATER L. REV. 105, 121 (1982) (Perhaps *Milwaukee II* does not entirely preempt the federal common law of nuisance in water pollution.).

201. 436 U.S. 618 (1978).

202. *Id.* at 625.

203. 451 U.S. 304, 315 n.8 (1981) (emphasis added).

204. *See* CONGRESSIONAL QUARTERLY ALMANAC, 96th Cong., 2d Sess. 584-89 (1980) (discussions of Superfund's legislative history); Eckhardt, *The Unfinished Business of Hazardous Waste Control*, 33 BAYLOR L. REV. 253 (1981); Javak & Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 76*, 3 COLUM. J. ENVTL. L. 205, 218-20 (1977).

inadequate to deal with [the] massive [inactive hazardous waste site] problem."²⁰⁵ This admission demonstrates the amount of reliability to be accorded to the use of optimistic descriptors by lawmakers. The legislative history of CERCLA is far less illuminating; in the haste to draft the compromise piece of legislation, no committee report was issued contemporaneous to the passage of the Act.²⁰⁶ Understandably, courts forced to interpret and apply hazardous waste statutes have afforded less than customary weight to the statements made by the Legislature.²⁰⁷

Read narrowly, *Milwaukee II* holds only that Congress intended the 1972 Amendments to provide exclusive federal control over activities regulated through discharge permit programs.²⁰⁸ This interpretation suggests that distinctions can be drawn based on the type of regulatory oversight that occurs and on whether the environmental conflict concerns activities regulated in a fashion analogous to the administrative program of the 1972 Amendments.²⁰⁹ The Clean Air Act has been distinguished from the Clean Water Act, in that a broad application of a *Milwaukee II* preemption holding has been withheld from the Clean Air Act.²¹⁰ Like the CAA and unlike the CWA, RCRA sets up a scheme that addresses some sources of pollution and not others.²¹¹ RCRA also represents the congressional desire to *enter* an area traditionally within the sphere of local responsibility,²¹² in contrast to the "total restructuring" and "complete rewriting" of the CWA considered in *Milwaukee II*.²¹³ As such, the hazardous waste legislation represents a fledgling approach as opposed to the "fine-tuning" of a complex environmental problem.

It is interesting to note that *Stepan* and *Price* characterize RCRA and CERCLA together as one comprehensive regulatory scheme from which congressional intent to

205. H.R. REP. NO. 1016, *supra* note 102, at 6120.

206. *See generally* Grad, *supra* note 171.

207. *See infra* text accompanying notes 334-51.

208. *See supra* text accompanying notes 228-64.

209. 33 U.S.C. §§ 1311-1312 (1982).

210. *See* New England Legal Found. v. Costle, 666 F.2d 30, 32 (2d Cir. 1981). In contrast to the FWPCA requirements, "the states and the EPA are not required to control effluents from every source, but only from those sources which are found by the states and the agency to threaten national ambient air quality standards." *Id.* at 32 n.2. In light of those and other differences, the court left "for a more appropriate case the question of whether all federal common law nuisance actions involving the emission of chemical pollutants into the air are precluded by the statutory scheme set forth in the Clean Air Act." *Id.*

211. *See* United States v. Kin-Buc, Inc., 532 F. Supp. 699 (D.N.J. 1982). The district court rejected defendant's argument that similarities between the Clean Air Act and the FWPCA logically require similar interpretation of the Acts with regard to the federal common law of nuisance regarding air pollution:

[T]his reasoning ignores the differences between the two acts. While the FWPCA regulates every point source of water pollution, the CAA regulates only those stationary sources of air pollution that are found to threaten national ambient air quality standards. Thus, it does not necessarily follow that the CAA pre-empts the federal common law of nuisance The CAA must be evaluated on its own terms.

Id. at 701. *But see* Pedersen, Jr., *Federal/State Relations in the Clean Air Act, the Clean Water Act, and RCRA: Does the Pattern Make Sense?*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 15,069, 15,070 (1982); *see also* City of Milwaukee v. Illinois, 451 U.S. 304, 318 (1981): "Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." (emphasis in original).

212. H.R. REP. NO. 1491, *supra* note 190, at 6240; *see also* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982).

213. 451 U.S. 304, 317 (1981).

preempt the federal common law of nuisance can be inferred.²¹⁴ This analysis lacks doctrinal neatness. It is well established that "CERCLA was designed to fill in some of RCRA's regulatory gaps."²¹⁵ Thus, congressional intent for RCRA to displace federal common law of nuisance in 1976 must be inferred from the "comprehensiveness" achieved four years later in 1980 with the passage of CERCLA.²¹⁶ This illogical conclusion is further weakened by passages of legislative history suggesting a congressional awareness that CERCLA would not provide a complete solution to the problems of financing hazardous waste cleanup.²¹⁷

The second objection to a general and broadly applied comprehensiveness preemption standard is that any congressional attempt to provide a comprehensive regulatory scheme to address hazardous waste problems has been frustrated. For example, the first permits promulgated by the EPA under the auspices of RCRA went into effect in 1980,²¹⁸ and as of August 1982 the final regulations governing landfills had not been promulgated. The regulations were long overdue and were not issued in areas that would adequately protect public health and the environment.²¹⁹ In 1984, 142 of approximately 7,600 hazardous waste facilities targeted by the EPA for permits had been granted final permits.²²⁰

Likewise, the CERCLA programs, as enacted and administered, do not reflect the additional statutory authority that Congress originally fashioned to instigate cleanup operations at existing hazardous waste sites. The concern for victim compensation had long been documented by Congress;²²¹ regardless, the lame duck session of the Legislature adopted a compromise Superfund law without a victim compensation provision.²²² Final acceptance of the compromise bill was tenuous, and to avoid the disintegration of earlier agreements the legislation was not resubmitted for technical amendments.²²³ Thus, a number of significant features were discarded and as enacted, CERCLA is a diminished piece of patchwork legislation. Consequently, the CERCLA administrative structure is still embryonic in regard to

214. *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1147-48 (E.D. Pa. 1982); *United States v. Price*, 523 F. Supp. 1055, 1069 (D.N.J. 1981).

215. *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1148 (E.D. Pa. 1982).

216. *See, e.g., id.*; *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981).

217. *See Florini, Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 HARV. ENVTL. L. REV. 307, 321 (1983).

218. As of 1982 only two hazardous waste management facilities had received final approval. *See 1982 RCRA Hearings*, *supra* note 194, at 23.

219. *See supra* text accompanying notes 234-39.

220. [14 Current Developments] ENV'T. REP. (BNA) 2228, 2229 (April 13, 1984); *see infra* text accompanying notes 234-46.

221. *See generally* S. COMM. ON ENVIRONMENT AND PUBLIC WORKS, INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENTS OF LEGAL REMEDIES: A REPORT TO CONGRESS IN COMPLIANCE WITH SECTION 301(e) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, (P.L. 96-510) BY THE SUPERFUND SECTION 301(e) STUDY GROUP, S. REP. NO. 97-12, 97th Cong., 2d Sess. (1982).

222. *See generally* Grad, *supra* note 171.

223. *See supra* note 221.

federal and state programs,²²⁴ and the EPA's ability to conduct operations and pursue lawsuits against responsible parties has been seriously questioned.²²⁵

The rocky beginnings marking the nation's approach to toxic waste issues characterize a congressional regulatory scheme that is not "universally" and "self-consciously" comprehensive.²²⁶ The RCRA and CERCLA programs, while fairly described as massive undertakings to enter the federal regulatory field, do not represent an entire "occupation" of that field.²²⁷ Thus, the "comprehensiveness" standard standing alone does not support the implication of a congressional resolve to preempt the federal common law of nuisance.

2. Expert Administrative Agency Supervision and Implied Intent to Preempt Federal Common Law

The second thrust of the *Milwaukee II* analysis of congressional intent revolved around the EPA's authority to subject all dischargers to the established administrative apparatus.²²⁸ The "assessment of the scope of the legislation" examined the extent to which the administrative agency acted pursuant to its authority.²²⁹ *Milwaukee II* expounds upon the nature and detail of FWPCA controls and the extent to which they subject water pollution problems to the expertise of administrative agencies.²³⁰ In determining that no interstice remained to be filled by federal common law, the Court identified the factors it considered most probative of congressional intent to preempt:

[T]he state agency duly authorized by the EPA to issue . . . permits under the Act has addressed the problem. . . . The agency imposed the conditions it considered best suited to further the goals of the Act, and provided for detailed progress reports so that it could continually monitor the situation. Enforcement action considered appropriate by the state agency was brought, as contemplated by the Act, again specifically addressed to the . . . problem.²³¹

Specifically, the *Milwaukee II* Court found the intent to supplant federal common law clearest when specific per-plant effluent limitations were established by EPA regulations.²³²

224. [14 Current Developments] ENV'T REP. (BNA) 1155 (Oct. 28, 1983).

225. See *supra* text accompanying notes 234, 239; see also [14 Current Developments] ENV'T REP. (BNA) 977 (Oct. 14, 1983). Superfund is considered too small to clean up more than a fraction of the nation's abandoned sites. William Hedeman, director of Superfund's implementation, admitted that "the resources of the fund simply are not adequate to deal with the array of problems that exist." Mintz, *A Response to Rogers, Three Years of Superfund*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,036 (Feb. 1984) (footnote omitted).

226. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 n.12, 319 (1981).

227. See *id.* at 317.

228. *Id.* at 319-20.

229. *Id.* at 320-23.

230. See *supra* text accompanying notes 62, 73.

231. 451 U.S. 304, 322-23 (1981).

232. *Id.* at 319; see 33 U.S.C. § 1311 (1982); 40 C.F.R. § 133.102 (1983).

a. *The RCRA Permits Programs*

Subtitle C of RCRA directs the EPA to promulgate regulations requiring permits for hazardous waste facilities.²³³ If "expert administrative agency" action under the hazardous waste laws parallels in nature and detail the water pollution regulatory oversight observed in *Milwaukee II*, the federal common law preemption holdings in *Price* and *Stepan* are more justified. However, EPA attempts to "address the problem" of hazardous waste do not comfortably survive a *Milwaukee II* "detailed review" and fail to support a preemption intent.

The RCRA Hazardous Waste Permit Program, as designed, describes a full-fledged, detailed schedule of regulations. However, the congressional mandate for compliance by hazardous waste handlers has not been fulfilled by permitting activities conducted by the EPA or by the authorized state agencies.²³⁴

Initially, the permitting of RCRA facilities is considerably behind schedule. The transfer to the states of authority over hazardous waste operations is underway. To date, EPA has granted interim authorization²³⁵ to forty-five states,²³⁶ which eventually authorizes state agencies to grant permits for hazardous waste facilities.²³⁷ The EPA establishes annual target dates for permit issuance by the states, and available data indicate that the agency confronts a significant permitting backlog. In fiscal year 1984, the EPA scheduled state agencies and agency regional offices to draft permits for 434 storage facilities, forty-nine incineration facilities, and twenty-two disposal facilities. A total of forty-seven RCRA permits were actually drafted in the first five months of fiscal year 1984.²³⁸ Indeed, of the approximately 7,500 hazardous waste facilities targeted for permitting, only 142 had been granted final permits as of February 1984.²³⁹

233. 42 U.S.C. § 6925 (1982); 40 C.F.R. § 264 (1983).

234. A general dissatisfaction with the status of RCRA administration and enforcement is capsulized in the following statement delivered by Senator Gary Hart: "Unfortunately, because of internal disorganization, inadequate budgetary resources, and an apparent policy of inaction, the EPA under this administration has reversed the slow progress begun in the late 1970's. The EPA over the past 15 months has put a premium on deregulation. . . ." 1982 RCRA Hearings, *supra* note 194, at 25 (opening statement of Hon. Gary Hart, U.S. Senator from Colorado).

Hart's sentiment, expressed in 1982, is echoed in the report accompanying the House of Representatives RCRA reauthorization bill, accompanying the House Res. 2867: the Committee on Energy and Commerce stresses its dissatisfaction "with the pace projected by EPA to complete the permit review process for hazardous waste facilities." H. R. REP. NO. 98, 98th Cong., 1st Sess. 45 (1983). EPA's Fiscal Year 1985-86 Operating Guidance as approved by Deputy Administrator Alvin Alm acknowledges that "compliance by the regulated community with the RCRA regulations has been unsatisfactory." FISCAL YEAR 1985-86 OPERATING GUIDANCE, SUMMARY SECTION, [14 Current Developments] ENV'T REP. (BNA) 2032 (March 9, 1984) [hereinafter cited as OPERATING GUIDANCE].

235. Interim authorization of state programs occurs in two phases. The first phase (Phase I) allows states to administer a hazardous waste program which covers identification and listing of hazardous wastes, and establishes preliminary (interim status) standards for hazardous waste treatment, storage, and disposal facilities. The second phase (Phase II) allows states to administer a permit program for hazardous waste treatment, storage, and disposal facilities. 40 C.F.R. § 271.121(b) (1983).

236. [15 Current Developments] ENV'T REP. (BNA) 397 (July 6, 1984).

237. See *supra* note 235.

238. *States Must Triple RCRA Staffs to Handle Statutory Duties Adequately*, [14 Current Developments] ENV'T REP. (BNA) 2229 (April 13, 1984) [hereinafter cited as *States RCRA Survey*]. According to the March 1984 EPA Office of Solid Waste and Emergency Response Status report, two permits for incineration facilities and one permit for disposal facilities were actually written in the five-month period. *Id.*

239. *Id.* John Skinner, EPA director of solid waste programs, told the Association of State and Territorial Solid Waste Management Officials at the National Solid Waste Forum that "no progress is being made . . . [n]ot even draft permits have been on target." *Id.*

The hazardous waste facilities not holding final permits are now governed by the less stringent interim status RCRA regulations.²⁴⁰ The EPA, in its official Fiscal Year 1985 Operating Guidance, has outlined a proposal designed to accelerate the processing of final permit applications. Under the proposal, the agency will require all facilities currently following interim status RCRA regulations to submit applications for final RCRA Part B permits by the end of fiscal year 1985.²⁴¹ State agencies are required either to issue or deny permits or issue closure notices for all land disposal and incineration facilities by fiscal year 1988 and for all storage and treatment facilities by 1990.²⁴²

The country thus faces a four to six year hiatus in which hazardous waste facilities will be subject only to interim status guidelines, assuming that the proposed timetable for final permitting is realistic and will achieve compliance. Also, until permitting has been completed no assurance exists that "marginal" facilities unable to comply with regulatory guidelines will be shut down. The EPA retains discretion to require a facility owner at any time to file an application for a final permit.²⁴³ However, the projected lengthy permitting schedule documents the overall anticipated timetable for facility permit evaluations and decisions. It is also doubtful that this EPA timetable is an accurate reflection of the RCRA compliance achievement schedule. Some states have not yet been granted interim authorization to run their entire programs, including the permitting of facilities.²⁴⁴ When interim authorization expires for all states in 1985, only states with final authorization will be permitted to

240. 40 C.F.R. § 265 (1983). Section 3005(e) of RCRA provides for the continued operation of an existing facility which meets certain conditions until final administrative disposition of the owner's and operator's permit application is made. 42 U.S.C. § 6925 (1982). See [14 Current Developments] ENV'T REP. (BNA) 1942 (March 9, 1984).

Until November 1983, any person who owned or operated an existing Hazardous Waste Management Facility could have interim status and be treated as having been issued a permit to the extent he or she complied as required with RCRA § 3010(a) and complied with the requirements governing submission of Part A applications. 40 C.F.R. § 270.70(a) (1983). The EPA clarified the scope of the interim status standards for owners and operators of hazardous waste treatment, storage, and disposal facilities in a final amendment to the standards. The final amendment imposes interim status standards on all hazardous waste management facilities in existence on November 19, 1980, the date RCRA regulations were issued. Hazardous waste management facilities operate under the interim status standards until EPA denies or issues a final permit. 48 Fed. Reg. 52,718 (1983).

Section 7 of the House RCRA reauthorization bill (Hazardous Waste Control and Enforcement Act of 1983, H.R. 2867, see *supra* note 161) had as its primary purpose the correction of deficiencies in interim status regulations. *RCRA Reauthorization*, *supra* note 161, at 44. The Conference Report, *supra* note 161, at H11,134, retains most of this section's provisions.

241. [14 Current Developments] ENV'T REP. (BNA) 1942 (March 9, 1984). A RCRA permit application consists of two parts, Part A and Part B. See 40 C.F.R. §§ 270.13-.29 (1983). For existing hazardous waste facilities, the requirement to submit an application is satisfied by submitting only Part A of the permit application until the date the Director sets for submitting Part B of the application. *Id.* § 270.1(b).

242. The EPA Draft Permitting strategy is reviewed at [15 Current Developments] ENV'T REP. (BNA) 127-28 (May 25, 1984) [hereinafter cited as *Draft Permit Policy*]. The projected deadlines are in the draft policy set forth as part of the EPA Fiscal Year 1985 Permitting Strategy to be issued in fiscal 1984. To accommodate state agencies in handling the applications, the draft strategy envisions a one-year hiatus on calls for permit applications from over 3,700 hazardous waste storage facilities until fiscal 1986 and 1987. *States RCRA Survey*, *supra* note 238, at 2229. The agency acknowledged that the plan would slow other RCRA permitting activities but "by calling in land disposal and incinerator permits first, we may initially issue fewer permits but expect to secure better results in protecting the environment." OPERATING GUIDANCE, *supra* note 234, at 2034.

243. 40 C.F.R. § 270.10(e) (1983).

244. See *supra* text accompanying notes 235-37.

implement their state hazardous waste plans in lieu of the federal program.²⁴⁵ To the extent that a number of states have yet to begin establishing administrative and regulatory procedures designed to handle the processing of hazardous waste facility permits,²⁴⁶ these states are unlikely to meet the deadlines suggested by the EPA draft proposal.

The nature of state programs operating under interim or final authorization is of equal concern. The EPA may grant interim authorization only to states with programs that are "substantially equivalent" to the federal program,²⁴⁷ and final authorization may be granted only to state programs "equivalent" to the federal program.²⁴⁸ The EPA has come under fire for granting Phase II and final authorization on the strength of a state's promises in a Memorandum of Agreement to achieve equivalence.²⁴⁹ It seems likely that state programs without final regulations in place are also destined to experience long permitting delays as the state agencies struggle to fulfill key federal program requirements. Finally, if a state fails to fulfill the Memorandum of Agreement, the EPA may be forced to revoke authorization and further disrupt the permit process.²⁵⁰

Additional factors are critical to a feasibility assessment of the EPA draft permitting strategy. As noted above, states are substantially behind schedule in issuing permits for hazardous waste facilities. This backlog is due in large part to inadequate funding and staffing at the state and federal level.²⁵¹ State hazardous waste administrators have criticized the expectations and goals established for the RCRA program and have charged the EPA with failure to account for the limited staffing levels and funds available to the states.²⁵² Despite procedural and management changes anticipated in the 1985 RCRA permit program, EPA permitting goals will probably go unmet²⁵³ unless increased funds are directed to state administrations.

Fundamental shortages of funds and skilled personnel, as well as a lack of administrative procedures designed to expedite hazardous waste permit application processes, indicate that federal and state agencies lack the resources to provide the detailed progress reports and monitoring activities extolled in *Milwaukee II*.²⁵⁴ State

245. 40 C.F.R. § 271.3 (1983). To date, only two states have received final authorization to operate statutory hazardous waste programs under RCRA, and only ten states have submitted final applications for full authorization. [15 Current Developments] ENV'T REP. (BNA) 397 (July 6, 1984). But see Joint Explanatory Statement, *supra* note 161, at H11,134 (interim authorization amended to expire on January 31, 1986).

246. See *supra* notes 238-39 and accompanying text.

247. 40 C.F.R. § 271.124(c) (1983).

248. *Id.*

249. *Hearings before the Subcomm. on Commerce, Transportation, and Tourism of the Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 501, 516-19 (1983) (prepared statement of Jane Bloom, attorney, Natural Resources Defense Council, Inc.); see 40 C.F.R. § 271.8 (1983).

250. 40 C.F.R. § 271.22-.23 (1983).

251. While the EPA increasingly has delegated responsibility for administering federal environmental programs to state governments, federal funding for carrying out those programs was reduced between fiscal 1981 and fiscal 1983. *Low Level of Federal Funding Under State Grants Programs may be Eroding Past Environmental Progress*, *State Officials Say*, [14 Current Developments] ENV'T REP. (BNA) 2296 (April 27, 1984).

252. *Id.*

253. OPERATING GUIDANCE, *supra* note 234.

254. *States RCRA Survey*, *supra* note 238, at 2229.

agency compliance inspections of RCRA hazardous waste facilities and enforcement actions initiated to address instances of non-compliance fell seriously short of the mark in fiscal year 1984. Hazardous waste disputes, as distinguished from the interstate controversy between Illinois and Wisconsin in *Milwaukee I* and *Milwaukee II*, will most probably concern disposal situations that have not been duly permitted. It would seem more appropriate to characterize the expert administrative agency action under RCRA as having *begun* to "address the problem" presented. The Court in *Milwaukee II* considered federal common law particularly inappropriate when used to impose regulatory standards more stringent than those established in permits actually issued under the FWPCA. However, the Court's opinion does not require deference to the expert agency when administrative and permitting activities do not parallel the FWPCA per-plant effluent limitations.

b. SDWA and CERCLA Administration

The EPA administers the "problem" of hazardous waste under SDWA²⁵⁵ and CERCLA as well. Under each statute the EPA has been taken to court by parties claiming that the agency violated statutory deadlines.²⁵⁶ The National Wildlife Federation and the Colorado Wildlife Federation sued EPA in July of 1983, claiming that the agency was allowing the injection of contaminants into underground drinking water sources. In addition, the groups claimed that EPA violated the Safe Drinking Water Act by not meeting statutory deadlines for the implementation of state underground injection programs.²⁵⁷ Under a settlement agreement, EPA must impose a regulatory program on states without satisfactory programs to control waste injection.²⁵⁸

The agency's implementation of CERCLA has also been controversial, with a history that significantly departs in tenor from the administration of early environmental standards.²⁵⁹ One of the most prominent examples of EPA heel-dragging under CERCLA involves the agency's failure to develop natural resource damage assessment regulations.²⁶⁰ The regulations were mandated by statute to be pro-

255. *Id.* A general criticism of the RCRA regulations for hazardous waste management facilities is that the monitoring requirements may be insufficient to detect environmental contamination. TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL, OFFICE OF TECHNOLOGY ASSESSMENT 376 (1983). See Comment, *Federal Water Pollution Laws: A Critical Lack of Enforcement by the Environmental Protection Agency*, 20 SAN DIEGO L. REV. 945 (1983).

256. See *National Wildlife Fed'n v. Ruckelshaus*, No. 83-1333 (D. Colo. filed July 26, 1983); *Goldberg v. Clark*, No. 84-1802 (D.D.C. filed June 13, 1984).

257. 42 U.S.C. § 300h(a)(1) (1982).

258. 20 ENV'T REP. CAS. (BNA) No. 9 News Notes (Feb. 24, 1984).

259. Khristine L. Hall, attorney and representative of the Environmental Defense Fund, voiced the group's dismay over EPA enforcement activities:

[I]t has become regrettably clear that we are no longer moving forward in protecting public health and the environment from the mismanagement of hazardous waste. . . . EPA has followed a course of action which places emphasis on deregulation and cost savings to industry at the expense of adequate protection of public health and the environment.

1982 RCRA Hearings, *supra* note 194, at 179; see also William D. Ruckelshaus, director of the Environmental Protection Agency, [12 Current Developments] ENV'T REP. (BNA) 1046 (Oct. 21, 1983) [hereinafter cited as Ruckelshaus].

260. CERCLA § 107(a), (c); 42 U.S.C. § 9607(a)(4)(C) (1982).

mulgated two years ago, along with EPA procedure regulations outlining how claims against the fund should be undertaken.²⁶¹ To date, at least three suits have been filed to compel the EPA administrator to promulgate natural resource damage assessment regulations.²⁶² As of this writing, the proposed rules have not been announced.

The *Milwaukee II* indicia of control and expertise, as asserted by an administrative agency empowered by a federal legislative scheme to address pollution sources, are not reflected in the current assessments of hazardous waste regulation. Indeed, present hazardous waste regulatory programs are more easily likened to the Clean Water Act programs found wanting in *Milwaukee I*. To the extent federal and state expert administrative agencies have failed to impose regulatory standards and issue and monitor hazardous waste permits, the broad reading of *Milwaukee II*, as woodenly applied in both *Stepan* and *Price*, is extremely suspect. The *Milwaukee II* Court, deferring to stringent effluent limitations and duly issued and enforced EPA permits,²⁶³ noted significantly that "[t]here is thus no question that the problem of effluent limitations has been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress."²⁶⁴ Numerous questions exist concerning the efficacy and thoroughness of congressional hazardous waste measures, and little doubt remains that the hazards of toxic pollution are not currently being addressed "as contemplated by Congress."

3. Alternate Federal Forum

A major concern underlying the recognition of federal common law is the availability of a forum in which complaining states can protect their interests.²⁶⁵ The need for some overriding control to prevent one state from polluting another state, a concern recognized in the adoption of the Constitution,²⁶⁶ requires that federal solutions be available to solve pollution conflicts. *Milwaukee I* established that federal common law and not the varying common law of the individual states should vindicate the environmental rights of a state against improper impairment by sources outside its domain.²⁶⁷ Additionally, the lenient regulatory approach taken by one state can inequitably transgress the more stringent pollution standard objectives of another state.

a. Federal Groundwater Regulation

Transboundary hazardous waste pollution involves the contamination of groundwater²⁶⁸ from which Americans receive fifty percent of their drinking

261. 42 U.S.C. § 9651(c) (1982).

262. 20 ENV'T REP. CAS. (BNA) No. 25 News Notes (June 22, 1984).

263. 451 U.S. 304, 320-22 (1981).

264. *Id.* at 320 (emphasis added).

265. *Illinois v. City of Milwaukee*, 406 U.S. 91, 104, 107 (1972).

266. *See supra* note 6.

267. 406 U.S. 91, 107 n.9 (1972).

268. "[G]round water" means water in a saturated zone or stratum beneath the surface of land or water." 15 U.S.C. § 9601(12) (1982).

water.²⁶⁹ Groundwater sources²⁷⁰ may exist underground in interstate areas,²⁷¹ so that leaching²⁷² of hazardous waste from landfills²⁷³ may deteriorate the water sources of one or more other states.²⁷⁴

Congress began to address the difficult task of regulating groundwater use and pollution by delegating responsibility to the states;²⁷⁵ current provisions in various environmental laws affect underground aquifers.²⁷⁶ However, the acute danger of groundwater contamination posed by the routine practice of injecting or burying highly toxic chemical wastes²⁷⁷ received direct attention in the SDWA and the hazardous substances legislation.²⁷⁸ Unfortunately, the Legislature's recognition of the grave risks associated with inadequate groundwater protection has not translated into effective regulatory action.

Because SDWA and RCRA overlap, the EPA coordinates its implementation of the two statutes by regulating aboveground ancillary facilities and activities associated with injection of hazardous wastes under RCRA, and injection wells under the SDWA.²⁷⁹ The EPA thus does not require those facilities permitted under the

269. [14 Current Developments] ENV'T REP. (BNA) 269 (June 17, 1983) (over 100 million Americans depend on underground drinking water supplies) [hereinafter cited as *Noncompliance with RCRA*].

270. Groundwater aquifers are also defined as "any underground formation saturated with water." Tripp & Jaffe, *Preventing Groundwater Pollution: Towards a Coordinated Strategy to Protect Critical Recharge Zones*, 3 HARV. ENVTL. L. REV. 1, 3 n.19 (1979).

271. Underground drinking water sources change across the United States and groundwater contaminants move about naturally or may be exported to other states. [14 Current Developments] ENV'T REP. (BNA) 354 (July 1, 1983).

272. Leaching is a process whereby pollutants migrate from the surface of the land or pond where they are placed, through the subsoil, and then into groundwater. WEBSTER'S 3D NEW INTERNATIONAL DICTIONARY 1282 (unabridged 1976).

273. EPA announced that organic chemicals, many of which are believed to cause cancer and other life-threatening diseases in humans, have been detected in 45 of the public water systems that draw on groundwater and serve over 10,000 people. The presence of these chemicals in underground sources of drinking water is generally believed to be the result of improper disposal of hazardous waste. 47 Fed. Reg. 9351 (1982).

274. A problem of pressing national concern involves the rapidly diminishing groundwater supplies throughout the West. Groundwater supplies are increasingly under pressure from the needs of growing cities, from water-intensive energy development projects such as power plants and coal-slurry pipelines, and from agriculture.

A district court in *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982), predicted, without citation to any authority, that groundwater pollution caused by hazardous waste disposal would cross state lines in only "rare instance[s]." *Id.* at 1107. It is probably not insignificant that this conclusion supported the court's determination that § 7003 of RCRA is not limited in application to groundwater pollution having interstate effects. *See id.*

275. 33 U.S.C. §§ 1288(b)(2)(I)-(K) (1982). Under § 208 of the CWA, the EPA can require states to plan for groundwater protection, but its authority to regulate groundwater is ambiguous.

276. Other federal statutes include: The Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982); The Surface Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (1982); The Safe Drinking Water Act, 42 U.S.C. §§ 300(f) to 300(j)-10 (1982). *See Dycus, Development of a National Groundwater Protection Policy*, 11 B.C. ENVTL. AFF. L. REV. 211, 257-67 (1984).

277. Cleanup of groundwater is often prohibitively expensive or technologically impossible. While the full nature of potential groundwater damage is presently unclear, contamination of underground drinking sources by hazardous waste disposal is described as widespread and the "most serious source" of pollution. Teclaff, *Principles for Transboundary Groundwater Pollution Control*, 22 NAT. RESOURCES J. 1065, 1071 (1982).

278. 42 U.S.C. § 300h (1982).

279. Under the Underground Injection Control Program (UIC) of the SDWA, which requires the EPA to prohibit any underground injection that endangers drinking water, EPA classified wells injecting hazardous waste into two categories, Class I and Class IV. Class IV wells posed the most serious threat to groundwater because they involved either direct injection of hazardous waste into a drinking water aquifer or injection into shallow wells above such aquifers. 40 C.F.R. § 144.6 (1983). The EPA recently announced the final rule banning all Class IV wells. 49 Fed. Reg. 20,138, 20,141 (1983).

Underground Injection Control (UIC) program²⁸⁰ to obtain a RCRA permit. If states are unwilling or unable to implement the UIC program, Congress requires the EPA to do so; the federal agency's permitting procedure reflects current application requirements.²⁸¹ Notwithstanding the progress of UIC permitting procedures, the EPA has acknowledged that the tests currently required to confirm the presence of groundwater contamination are inaccurate. The tests are scheduled to be replaced by less sensitive alternative testing methods.²⁸² The value of test predictions, however, will be difficult to gauge. According to a recent GAO report, seventy-eight percent of hazardous waste facilities are not complying with the federal requirement to monitor groundwater.²⁸³ Enforcement efforts against violators have been limited,²⁸⁴ due in part to growing manpower and resource shortage problems at the EPA's regional and state offices.²⁸⁵ In addition, any land disposal facility that closed or did not receive hazardous waste after January 26, 1983 (the effective date of the final land disposal regulations) is not subject to the corrective action or groundwater monitoring requirements of those regulations. Several EPA regions have documented a substantial number of facilities and units that have closed or stopped taking wastes after January 26. If any of these facilities or units cause a release into the environment at any point in the future, little warning and no remedy will be provided.²⁸⁶

CERCLA will provide limited assistance in the regulation of groundwater. The Act was designed to clean up releases of hazardous substances rather than to regulate their disposal. Nevertheless, the Act establishes a regulatory regime with reporting, cleanup, liability, and enforcement provisions that can be invoked to prevent or stem hazardous waste facility groundwater pollution.²⁸⁷ However, the EPA's record of accomplishment under the CERCLA cleanup authority reveals mismanagement and deficiencies far worse than those observed in its administration of the RCRA provisions. The failure to establish hazardous waste toleration level standards,²⁸⁸ the disorganized nature of operations and day-to-day management of agency functions,²⁸⁹ and the absence of streamlined procedures to overcome obstacles of paperwork and red tape have all significantly impeded the EPA's ability to pursue lawsuits against parties responsible for hazardous waste sites.²⁹⁰ Also, CERCLA monies are clearly inadequate to clean up even the priority-status hazardous waste sites, let alone the 16,000 sites already known to exist.²⁹¹ "[A] lack of organization,

280. 42 U.S.C. §§ 300h(b)(1), 300h-1, 300h-2 (1982).

281. 49 Fed. Reg. 20,138, 20,143, 20,155 (1984) (to be codified at 40 C.F.R. §§ 124, 144, 146-47).

282. *Problems with Test Required for Monitoring Groundwater Prompt EPA to Revise Approach*, [14 Current Developments] ENV'T REP. (BNA) 1415 (Dec. 9, 1983).

283. See *Noncompliance with RCRA*, *supra* note 269.

284. *Id.*

285. See *supra* text accompanying notes 251-52, 254.

286. *RCRA Reauthorization*, *supra* note 161, at 45-46.

287. See *supra* text accompanying notes 101-09.

288. Ruckelshaus, *supra* note 259.

289. *Noncompliance with RCRA*, *supra* note 269.

290. *Id.*

291. Ruckelshaus, *supra* note 259.

a lack of personnel, and a lack of direction from the top'' were identified as major stumbling blocks in the CERCLA programs.²⁹²

Notwithstanding these criticisms, EPA's Fiscal Year Operating Guidance reviews policy changes and forecasts a significantly enhanced rate of cleanup during the rest of fiscal year 1984 and throughout fiscal year 1985.²⁹³ However, in the document the EPA concedes that "it will take many years to substantially eliminate the nation's abandoned hazardous waste site problem, depending upon the length of time and level of funding contained in the reauthorization legislation."²⁹⁴ Additionally, the CERCLA program reauthorization will be accompanied by a myriad of new rules and amendments expanding the program, which will slow agency progress in cleaning up sites.²⁹⁵ For example, new and expanded responsibilities will be imposed on the EPA by the Senate bill reauthorizing RCRA and CERCLA.²⁹⁶

b. *The Potential for Interstate Groundwater Controversies*

Supplemental state and local regulation of groundwater drinking sources is generally considered inadequate as well.²⁹⁷ As noted above, RCRA establishes a shared regulatory program under which states may take individual regulatory actions needed to attain the goals of the hazardous waste program as approved by the EPA.²⁹⁸ However, most state and local governments have not successfully conducted solid waste management and resource recovery activities.²⁹⁹ Similarly, the ability of a state to fulfill its role in implementing the CERCLA program is questionable. The federal government's contribution to cleanups is limited by statute,³⁰⁰ leaving the bulk of hazardous waste site cleanup to the states.³⁰¹

292. GAO says 78 Percent of Facilities Sampled Not Complying with Groundwater Monitoring, [14 Current Developments] ENV'T REP. (BNA) 976, 977 (Oct. 14, 1983).

293. OPERATING GUIDANCE, *supra* note 234, at 2034.

294. *Id.*

295. Ruckelshaus Moving to Shape Congressional Action on Superfund, Inside E.P.A. Weekly Report, June 22, 1984, at 9.

296. See generally Conference Report and Joint Explanatory Statement, *supra* note 161, at H11,103-11,141.

297. Most states lack comprehensive statutes and regulatory programs specifically designed to protect groundwater. According to a report on an American Petroleum Institute Study, 16 states have adopted groundwater classification schemes and 19 states have some form of groundwater quality standards. A.P.I. Presents Overview of State Groundwater Programs, 5 HAZARDOUS WASTE REPORT 7 (Jan. 9, 1984).

298. "States may take over and operate all of this machinery if they choose. There are no 'reserved' sources that must be permitted or otherwise regulated by the federal government, with the limited exception of some sources on Indian land." Pedersen, *supra* note 211, at 15,070.

299. See *supra* text accompanying notes 249-54.

300. Unless an emergency situation that poses an immediate risk to public health, welfare, or the environment arises and federal action is necessary, or unless the affected state has become a cooperating party, the federal government's cleanup is limited to expenditures of one million dollars or a duration of six months. 42 U.S.C. § 9604(c)(1) (1982).

Remedial actions can be undertaken only after consulting with the affected states and only if the state agrees to assure all future maintenance of the removal and remedial actions provided, to assure the availability of a hazardous waste disposal facility for offsite storage or disposal, and to pay 10% of the remedial costs. *Id.* § 9604(c)(2)-(3).

A party's response to releases of hazardous substances apparently must be in accordance with the requirements of a National Contingency Plan. Bulk Distribution v. Monsanto Co., No. 83-6805-CIV-JAG, slip. op. (S.D. Fla. June 19, 1984), *Hazardous Waste L.R.* 5874 (July 2, 1984). Finally, EPA must respect the priority established by the states, despite the development of a national list of priority waste sites. Pedersen, *supra* note 211, at 15,083-84.

301. It is expected that the federal government will be able to be directly involved in the cleanup of only 100 to 400 sites, or on the average from two to eight per state. Pedersen, *supra* note 211, at 15,084.

Questions of interstate groundwater management that are traditionally delegated to the courts are assuming greater importance as the drinking water supplies of states become susceptible to the less regulated hazardous waste disposal practices of neighboring states.³⁰² The potential for an increased number of interstate conflicts stemming from the pollution of underground aquifers is already being realized: in *Stepan*,³⁰³ the court refused the City of Philadelphia's invitation to address the availability of federal common law as it affected groundwater under the CWA. Instead, the court held that the interstate groundwater pollution was "but one element of the damage resulting from [the] illegal disposal" of hazardous waste and that the City's complaint was premised upon this illegal disposal.³⁰⁴ The *Stepan* court then agreed with Justice Brotman's determination in *Price*³⁰⁵ that because of their comprehensive schemes, RCRA and CERCLA preempted federal common law. Although reviewing a claim potentially involving interstate pollution, the court in *Stepan* failed to comment on the absence of a neutral forum in which out-of-state parties could seek redress.³⁰⁶ Neither SDWA, RCRA, nor CERCLA contains a corollary to section 208 of the CWA,³⁰⁷ which establishes a procedure by which states can plan on an area-wide basis to regulate pollution.³⁰⁸

The permit-granting processes conducted pursuant to both SDWA and RCRA did *not* include the same notice and comment procedure that the *Milwaukee II* Court deemed satisfactory to protect the states' interest in the availability of an impartial

302. In Massachusetts, for example, the regulations on the financial operating responsibility and operating procedures of hazardous waste treatment facilities are at least as strict as federal rules in some areas, and in the area of financial responsibility and groundwater monitoring even stricter. [14 Current Developments] ENV'T REP. (BNA) 1162 (Oct. 28, 1983) (Joy Kind, spokesperson for the Massachusetts Department of Environmental Quality Engineering).

303. 544 F. Supp. 1135 (E.D. Pa. 1982).

304. *Id.* at 1147; see also *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982). The court in *Reilly Tar* appears to agree that *Milwaukee II* would require dismissal of a claim alleging interstate groundwater contamination based on the federal common law of nuisance. *Id.* at 1107 n.1.

305. 523 F. Supp. 1055 (D.N.J. 1981).

306. The court resolved the various claims by permitting the City of Philadelphia to preserve its claim for response costs under CERCLA and its claim for damages based on its state common law of nuisance, trespass, strict liability, and negligence. 544 F. Supp. 1135, 1154 (E.D. Pa. 1982).

307. 33 U.S.C. § 1288 (1982).

308. In interstate situations, the governors or local officials of the respective states consult and cooperate regarding the designation of the boundaries of the interstate area and a representative organization to develop the area-wide waste treatment management plans. *Id.* § 1288(a)(3). No permit is to be issued for any point that is in conflict with the management plan. *Id.* § 1288(e). Despite this feature, § 208 has yet to fulfill its promise. The EPA has delayed issuing regulations, agency financing for the program has been diverted, and areas that might well be some of the greatest benefactors of the program, such as interstate metropolitan areas, have not been designated. [12 Current Developments] ENV'T REP. (BNA) 612 (Sept. 18, 1981).

RCRA does authorize states to enter into interstate compacts for "cooperative effort and mutual assistance for the management of . . . hazardous waste . . . and the enforcement of their respective laws relating thereto." 42 U.S.C. § 6904(b)(1) (1982).

The *Milwaukee II* opinion made no reference to the role of interstate compacts as a substitute for federal common law. This omission is quite probably the result of the Court's recognition of the unlikelihood that states with conflicting standards of environmental protection would adopt effective administrative mechanisms, even if timely congressional approval could be obtained. While interstate compacts could provide states with a legitimate means of attaining equitable solutions to hazardous waste controversies, this form of joint effort will not provide the necessary forum for redress.

forum.³⁰⁹ Indeed, the laws fail to recognize the potential interstate character of underground waters; RCRA leaves the question of the interstate pollution of aquifers completely unmentioned. Prompted by the inadequate measures available to protect groundwater resources, the EPA recently established a new Office of Groundwater Protection. The new department will promote consistent policies and regulations to protect groundwater under all the relevant environmental legislation.³¹⁰ The latest draft groundwater protection strategy issued by the EPA predominantly consists of EPA efforts simply to coordinate existing rules on groundwater protection.³¹¹ The draft strategy exhorts states to establish an aquifer classification system similar to the voluntary program outlined in RCRA,³¹² but has been criticized for its failure to describe how classifications of aquifers and other strategies will be accomplished by the individual states.³¹³ The draft also does not propose an adequate source of funding for the states to develop and operate groundwater programs.³¹⁴ The states without groundwater quality programs have objected to the draft strategy, claiming that funds are not available to draft and implement groundwater strategies of their own.³¹⁵ Also missing from the proposed system of groundwater protection is a system supported by the EPA to train staff personnel in the technology of groundwater science.³¹⁶

It appears that fifteen to nineteen states have adopted some type of groundwater quality standards program,³¹⁷ which vary widely in approach. The diversity in approaches taken by states controlling groundwater use suggests a potential for controversies between neighboring states with land situated over a common aquifer.³¹⁸ The EPA draft policy does not address the protection of interstate aquifers, and inconsistent standards arising in areas governed by state activities

309. The notice and comment procedure required by the appeal process is described in 40 C.F.R. § 271.20 (1983): Prior to submitting an application to EPA for approval of a State program, the State shall issue public notice circulated in a manner calculated to attract the attention of interested persons including: (i) Publication in enough of the largest newspapers in the State to attract statewide attention; and (ii) Mailing to persons on the State agency mailing list and to any other persons whom the agency has reason to believe are interested. . . .

310. OPERATING GUIDANCE, *supra* note 234, at 2033.

311. Mike Synar, chairman, House Government Operations Subcommittee on Environment, Energy, and Natural Resources, [14 Current Developments] ENV'T REP. (BNA) 2227-28 (April 13, 1984). Synar released a Congressional Research Service analysis that he said "showed the current EPA draft strategy to be the weakest of the three drafted since 1980." *Id.* at 2228. Marian Mlay, director of the EPA's new Office of Groundwater, told the National Agricultural Chemicals Association that a final groundwater strategy probably would be issued in late May or early June. [14 Current Developments] ENV'T REP. (BNA) 2288 (April 27, 1984).

312. Jacqueline Warren, toxics project director, Nat'l Resources Defense Council, Inc., [14 Current Developments] ENV'T REP. (BNA) 2288 (April 27, 1984).

313. David W. Miller, groundwater consultant, Geraghty & Miller, [14 Current Developments] ENV'T REP. (BNA) 2257 (April 20, 1984).

314. Under the draft strategy, states would receive money only to develop the programs and the funding would come from existing state grants. Warren, *supra* note 312. The budget proposed by the administration for fiscal year 1985 does not include funds to aid states. Synar, *supra* note 311, at 2228.

315. Alm, *supra* note 234.

316. Jay H. Lehr, executive director, National Water Well Association [14 Current Developments] ENV'T REP. (BNA) 2256 (April 20, 1984).

317. Joan Warren, staff associate, National Governor's Association, [14 Current Developments] ENV'T REP. (BNA) 2288 (April 27, 1984). Statutory permit systems have been adopted in most Western States, while fewer than half the Eastern States have any centralized planning or control of groundwater use. Dycus, *supra* note 276, at 231.

318. Alm, *supra* note 234.

appear likely.³¹⁹ Additionally, the final groundwater protection strategy will not carry the force of regulation and will not require states to adopt more stringent effective groundwater protection measures than they currently employ.³²⁰ These "inconsistencies" between varying state approaches to groundwater protection issues assume critical significance when current federal groundwater protection strategies are examined. RCRA groundwater monitoring requirements³²¹ are not likely to safeguard aquifers affected by RCRA-regulated sites. "Technical complexity and site specificity make it difficult for government rules to set conditions for effective groundwater monitoring."³²² The possibility of interstate resource conflicts stemming from the hazardous waste contamination of shared aquifers is thus very real. The predicament that a state encounters when its groundwater resources are exposed to the contaminating practices of a neighboring state mirrors the dilemma faced by Illinois and other "downstream" states. However, groundwater control questions are distinct from traditional water pollution questions since they are focused on prevention.³²³ The huge costs involved in the cleanup of groundwater contamination, as well as the imperfect and inadequate technologies used to detect and cleanup contamination,³²⁴ counsel strongly for regulatory controls designed to prevent groundwater resource degradation.

Milwaukee I and *Milwaukee II* recognized the need for alternative federal forums in which to resolve disputes of this nature. The *Milwaukee II* Court found that the "ample opportunity for a State affected by decisions of a neighboring State's permit-granting agency to seek redress" sufficed to provide a forum for interstate water pollution controversies.³²⁵ As Justice Blackmun observed in his dissenting opinion to *Milwaukee II*:

Since both the Court and Congress fully expected that neighboring States might differ in their approaches to the regulation of the discharge of pollutants into their navigable waters, it is odd, to say the least, that federal courts should now be deprived of the common-law power to effect a reconciliation of these differences.³²⁶

Nevertheless, the majority in *Milwaukee II* appeared satisfied that a statutory permit-granting process ensures an impartial forum for the pursuit of claims. The Court further implied that the existence of an administrative mechanism designed to

319. "In short, there is, with rare exception, no conjunctive management of groundwater quantity and quality by the states at this time." Dycus, *supra* note 276, at 232.

320. Mlay, *supra* note 311, at 2288.

321. 40 C.F.R. § 264.90 -.100 (1983); see Dycus, *supra* note 276, at 257-64.

322. Joel S. Hirschhorn, senior associate, Office of Technology Assessment, [14 Current Developments] ENV'T REP. (BNA) 2228 (April 13, 1984). The effectiveness of one national solution to groundwater contamination is doubted because sources of contamination and uses and geographical formations of aquifers vary from state to state. But see Dycus, *supra* note 276, at 232-33.

323. The Teclaffs highlight this distinction: "There are important differences between surface and ground water pollution. Groundwaters store pollution and the process is often irreversible, whereas surface flowing waters have some capability for self-purification." Teclaff & Teclaff, *Transboundary Ground Water Pollution: Survey and Trends in Treaty Law*, in INTERNATIONAL GROUNDWATER LAW 77, 80 (1981).

324. Hirschhorn, *supra* note 322.

325. 451 U.S. 304, 326 (1981).

326. *Id.* at 351 (Blackmun, J., dissenting).

accommodate the objections of neighboring states to an agency's permit issuance reflects congressional intent to supplant the role of federal common law.³²⁷

This inference is unavailable in the hazardous waste context. A state's dissent to the official permitting of a particular hazardous waste facility does not receive the administrative review approved as a substitute for federal common law in *Milwaukee II*. Additionally, permit issuance under RCRA and SDWA will occur slowly. Until all or most facilities are permitted, a state has no opportunity to object at a statutory, administrative proceeding to the hazardous waste practices of a sister state. Neither *Price* nor *Stepan* specifically explored the need to entertain interstate challenges in a neutral forum. This omission renders each court's application of *Milwaukee II*, and the conclusion that the federal common law of nuisance is preempted, less authoritative.

IV. THE NEED FOR A FEDERAL COMMON LAW IN HAZARDOUS WASTE DISPUTES

Interstate disputes should not be resolved under state law, because the nature of the controversy makes state law an inappropriate vehicle for control.³²⁸ Groundwater resource controversies implicate "uniquely federal interests"³²⁹ and present the strongest case for the application of a federal rule of decision.³³⁰ Traditionally, federal common law has been developed to protect federal interests in a subject matter and to provide "an unbiased forum for the resolution of interstate disputes."³³¹

This Note dissects the comprehensiveness standard and other factors apparently significant to the preemption question in *Milwaukee II*. Factors relevant to the analysis focusing on the absence of preemption also are relevant to the question of

327. *Id.* at 326. Justice Blackmun noted in his dissent that the majority's conclusion that "the scheme established by § 402 'provides a forum for the pursuit' of a neighboring State's claim is not inconsistent with the understanding that other forums remain available." *Id.* at 345 n.19 (Blackmun, J., dissenting) (emphasis in original).

328. *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 641 (1981). Although the Court in *Milwaukee II* did not reach this issue, the state court forum may be completely foreclosed. 451 U.S. 304, 310 n.4 (1981). The opinion did address the availability of state law remedies in several oblique passages. Identifying an "inconsistency" in the argument made by Illinois, the Court noted that "[i]f state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." *Id.* at 313 n.7. Resort to state law remedies was denied in *Illinois v. City of Milwaukee (Milwaukee III)*, 731 F.2d 403 (7th Cir. 1984). The *Milwaukee III* decision, a ruling on an appeal from the United States Supreme Court's remand of *Milwaukee II* (and on an interlocutory appeal in related cases), found that federal law precluded the application of state law to determine liability or establish a remedy for interstate water pollution. The Court identified the issue in interstate resource disputes to be one of "'dividing the pie,' i.e., the equitable reconciliation of competing uses of an interstate body of water." *Id.* at 410. The competing uses of groundwater resources present similar problems of equitable resource allocation.

329. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983). The Seventh Circuit appropriately noted that "[t]he claimed pollution of interstate waters is a problem of uniquely federal dimensions requiring the application of uniform federal standards." *Illinois v. City of Milwaukee*, 731 F.2d 403, 410 (7th Cir. 1984).

330. The Supreme Court's equitable apportionment of interstate stream waters demonstrates the development of "interstate common law." See *Kansas v. Colorado*, 206 U.S. 46 (1907). While an action need not be interstate to invoke federal common law, Collins, *supra* note 176, at 319, interstate federal common law incorporates both the federal interest in a rule of decision as well as issues of federalism between the states.

331. Bleiweiss, *supra* note 75, at 60.

whether federal common law is needed in hazardous waste cases. Basic federal interests will be touched when transboundary groundwater contamination occurs.³³² A uniform federal rule of decision is desirable in hazardous waste disputes, especially in groundwater contamination controversies.³³³ Finally, a variety of loopholes undermine efforts to enforce the overriding federal interest in environmental protection and the reform of hazardous waste disposal practices.³³⁴ *Milwaukee II* does not require the *complete* preemption of federal common nuisance law in hazardous waste litigation. However, this conclusion does not demand ipso facto that federal common law is an appropriate and *needed* remedy.³³⁵ The *Price* and *Stegan* courts could have avoided their wholesale³³⁶ application of *Milwaukee II* by concluding that RCRA and CERCLA codified the common law of nuisance, thus removing the need for public nuisance theories in hazardous waste actions. Authority for this position is provided in a recent decision by the Fourth Circuit interpreting *Milwaukee II*:

In that case, the Supreme Court, interpreting the scope and effect of the Federal Water Pollution Control Act (FWPCA) amendments of 1972, held that federal courts were not free to apply nuisance principles in the area of water pollution control when Congress has occupied the field with a comprehensive regulatory scheme. The Court cautioned that the judiciary's power to apply common-law principles was not preempted by the FWPCA; it simply could not coexist with a statutory framework Congress devised to treat the same problems.³³⁷

The opinion in *United States v. Waste Industries (Waste II)*³³⁸ reversed the district court's³³⁹ conclusion that RCRA and CERCLA preempted the federal common law of nuisance.³⁴⁰ The district court (*Waste I*) concluded that section 7003 of RCRA, the imminent hazard provision, did not apply to inactive or abandoned

332. *Milwaukee II* can be read to mean that administrative agency permit review procedures and programs provide a neutral forum sufficient to protect federal interests. *Illinois v. City of Milwaukee*, 731 F.2d 403, 412-13 n.5 (7th Cir. 1984); see *supra* notes 235-39 and accompanying text.

333. Although no comprehensive congressional plan for protection of the nation's groundwater exists, "an integrated federal strategy to safeguard groundwater supplies from future acts of destruction" is needed. Dycus, *supra* note 276, at 267. But see *Groundwater Policy State not Federal Responsibility*, 5 HAZARDOUS WASTE REPORT 3 (Jan. 9, 1984) (A centralized national policy would interfere in state and regional groundwater protection responsibilities.).

334. See *supra* note 234. The executive director of the Hazardous Waste Treatment Council, Rich C. Fortuna, presented the Council's recommendations concerning hazardous waste treatment and addressed the current regulatory scheme's weaknesses:

[L]oopholes have been the focus of several studies, most notably the Office of Technology Assessment report which was issued earlier this year . . . Suffice to summarize at this point that more generators and individual waste streams are exempt than are subject to present regulatory coverage: the hole is literally bigger than the doughnut.

Hazardous Waste Control and Enforcement Act, H.R. 2867 (Part 2—Innovative Technologies): Hearing Before the Subcomm. on Energy, Environment, and Safety Issues Affecting Small Business of the Comm. on Small Business, 98th Cong., 1st Sess. 27, 28 (1983) (prepared statement of Richard C. Fortuna, Executive Director, Hazardous Waste Treatment Council).

335. *United States v. Price*, 523 F. Supp. 1055, 1069 (D.N.J. 1981), suggests that need was not demonstrated. See *supra* notes 124-34 and accompanying text.

336. Collins, *supra* note 176, at 299.

337. *United States v. Waste Indus.*, 734 F.2d 159, 167 (4th Cir. 1984).

338. *Id.* at 159.

339. *United States v. Waste Indus.*, 556 F. Supp. 1301 (E.D.N.C. 1982); see *supra* text accompanying note 148.

340. See *supra* text accompanying notes 148-51.

waste disposal sites.³⁴¹ The lower court applied rules of statutory interpretation and read section 7003 to be solely jurisdictional.³⁴² The district court also determined that under *Milwaukee II* RCRA and CERCLA preempted a federal common law of hazardous wastes.³⁴³ The *Waste II* court rejected the district court's interpretation of section 7003 and ruled that Congress intended to establish substantive liability by expanding the common law under the imminent hazard provision.³⁴⁴ The court recognized that section 7003 "is essentially a codification of the common law public nuisance."³⁴⁵ The Fourth Circuit also noted that Congress expressly intended section 7003 to close loopholes in environmental protection³⁴⁶ and loopholes in the *act itself*:

Section 7003 is a congressional mandate that the former common law of nuisance, as applied to situations in which a risk of harm from solid or hazardous wastes exists, shall include new terms and concepts which shall be developed in a liberal, not a restrictive, manner. This ensures that problems that Congress could not have anticipated when passing the Act will be dealt with in a way minimizing the risk of harm to the environment and the public.³⁴⁷

The *Waste I* court used *Milwaukee II* to support its decision that RCRA and CERCLA provide the sole substantive standards in the field of hazardous waste disposal.³⁴⁸ The Fourth Circuit disagreed, stating that:

This, however, misreads the lesson of *City of Milwaukee* . . . [which] disapproved only of the *court's* use of federal common law as a source for setting regulatory standards independent of those established by a comprehensive statutory scheme. The Court did not assail *Congress's* prerogative to empower the courts to apply common-law principles as part of an ongoing regulatory scheme.³⁴⁹

341. 556 F. Supp. 1301, 1307 (E.D.N.C. 1982). The district court concluded that § 7003 was similar to other statutory sections designed solely to eliminate emergency problems. The court of appeals disagreed, reading the language of § 7003 to demonstrate that Congress contemplated circumstances when the section's application is not specifically limited to an "emergency." *United States v. Waste Indus.*, 734 F.2d 159, 165 (4th Cir. 1984). The Fourth Circuit's interpretation is that § 7003 follows the holding in *United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982). Congress has specifically rejected the decision in *Waste I* as "inconsistent with the authority conferred by the section as initially enacted and with these clarifying amendments." Joint Explanatory Statement, *supra* note 161, at H11,137; *accord*, *Jones v. Inmont Corp.*, 20 ENV'T REP. CAS. (BNA) 2001, 2009 (S.D. Ohio 1984).

342. 556 F. Supp. 1301, 1308-09 (E.D.N.C. 1982).

343. *Id.* at 1315-16.

344. *United States v. Waste Indus.*, 734 F.2d 159, 167 (4th Cir. 1984). Two additional courts have determined that § 7003 provides only a jurisdictional basis under which citizens may bring suit. *See United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980); *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138 (N.D. Ind. 1980). The court in *United States v. Diamond Shamrock Corp.*, 12 ENV'T L. REP. (ENV'T L. INST.) 20,819 (N.D. Ohio 1981), has concluded that § 7003 contains both jurisdictional and substantive standards. Other courts presented with suits brought under § 7003 have applied the imminent hazard provision without resolving whether or not Congress created a substantive standard in the section. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1110 (D. Minn. 1982); *United States v. Wade*, 546 F. Supp. 785, 788 n.6 (E.D. Pa. 1982); *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870, 884-85 (E.D. Ark. 1980).

345. 734 F.2d 159, 167 (4th Cir. 1984) (quoting SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., REPORT ON HAZARDOUS WASTE DISPOSAL 31 (Comm. Print 1979)).

346. *Id.* at 167.

347. *Id.* at 166.

348. *See supra* text accompanying notes 148-51.

349. *United States v. Waste Indus.*, 734 F.2d 159, 167 (4th Cir. 1984) (emphasis in original).

Congress empowered the courts to apply common-law principles in RCRA's imminent hazard provision and in section 106(a),³⁵⁰ the imminent hazard provision in CERCLA.³⁵¹ A number of opinions confirm that standards of liability under CERCLA are governed by federal common law.³⁵² However, *Waste II* is the only decision that addressed the effect of *Milwaukee II* on federal common nuisance law. The *Waste II* opinion did not analyze congressional intent. The court also did not conclude that RCRA and CERCLA are "comprehensive regulatory schemes" that displace general common nuisance law. However, it seems clear that the Fourth Circuit found it unnecessary to analyze these issues. If courts are "empowered" to apply fully principles of common law under the imminent hazard and liability provisions of the hazardous waste laws, there is no need to access the federal common law of nuisance. Thus, if federal common law of nuisance claims are pleaded alongside claims under RCRA section 7003 or CERCLA section 106(a) or section 107, a court might ignore or deny the claims on the ground of redundancy.

V. CONCLUSION

The Supreme Court reasoned in *Milwaukee I* that the federal common law was available to remedy an environmental nuisance because "the various laws which Congress had enacted 'touching interstate waters' were 'not necessarily the only federal remedies available.'"³⁵³ Similarly, the laws Congress introduced "touching" hazardous wastes have not preempted the field of federal common nuisance law. Specifically, the groundwater protection laws are currently inadequate and the "EPA is making little progress *addressing* widespread groundwater contamination problems."³⁵⁴

This Note has attempted to demonstrate that the hazardous waste regulatory programs do not provide the sole source of substantive standards of decision in the field of toxic waste disposal. In *Milwaukee II* the Supreme Court ruled that the enactment of a comprehensive regulatory program implied congressional intent to preempt judge-made environmental law. By applying the factors the Supreme Court emphasized in its preemption analysis, this Note concludes that the legislative response to the problems of hazardous waste did not completely preempt federal common law. Congress expressly preserved common-law remedies to assist hazardous waste site cleanup efforts, and mandated the application of common law principles under imminent hazard and liability provisions of CERCLA and RCRA.

Julia A. Davis

350. 42 U.S.C. § 9606(a) (1982); see *supra* text accompanying notes 101-09.

351. This Note does not analyze the contours of the scope of liability under CERCLA §§ 106(a) and 107.

352. *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984); *United States v. A & F Materials Co.*, 578 F. Supp. 1249 (S.D. Ill. 1984); *United States v. Stringfellow*, 20 ENV'T REP. CAS. (BNA) 1905 (C.D. Cal. 1984); *United States v. Chem-dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983); see Hinds, *Liability under Federal Law for Hazardous Waste Injuries*, 6 HARV. ENVTL. L. REV. 1, 12, 15-19, 32-33 (1982).

353. 451 U.S. 304, 309 (1981) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 101, 103 (1972)).

354. *Groundwater Protection Inadequate*, *Conservation Foundation Reports*, 5 HAZARDOUS WASTE REPORT 6 (June 25, 1984) (quoting a Conservation Foundation report) "State of the Environment: an Assessment at Mid-Decade" (emphasis added).

